1879
10-267

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1085.~~ 720

THE STATE OF TENNESSEE, PLAINTIFF, vs. JAMES M. DAVIS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED FEBRUARY 20, 1879.

1 UNITED STATES OF AMERICA,
District of Middle Tennessee:

At an adjourned term of the circuit court of the United States for the district aforesaid, begun and held at Nashville, Tennessee, on Wednesday, the first day of January, 1879, and in the year of our Independence the 103rd year. Present and presiding, the Hon'l John Baxter and Hon. Connally F. Trigg, judges, &c. The following proceedings were had and entered of record, to wit:

Indictment for murder.

STATE OF TENNESSEE
vs.
JAMES M. DAVIS.

This, the 6th day of January, 1879, the Hon. John Baxter, circuit judge, and the Hon. Connally F. Trigg, district judge, presiding. Upon motion on the part of the State of Tennessee, by its attorney, General J. B. Lea, to remand this cause to the State court in which the indictment was found, the said judges were divided in opinion upon the following questions, to wit:

2 1st. Is an indictment of a revenue officer, found in a State court, for murder, under the facts alleged in the petition for removal in this case, removable to this court under section 643 of the Revised Statutes of the U. S.? The petition being in the words following, to wit:

Petition for certiorari.—Filed Aug. 29, 1878.

STATE OF TENNESSEE
vs. } #2137.
JAMES M. DAVIS.

To the honorable judges of the circuit court of the United States for the district of Middle Tennessee:

Your petitioner, James M. Davis, would most respectfully show to the court that on the 21st day of May, 1878, at the May term of the circuit court of Grundy County, Tennessee, the grand jurors for the State of Tennessee, at the instance of E. M. Haynes, as prosecutor, indicted your petitioner for wilfully, premeditatedly, deliberately, and of his malice aforethought killing one J. B. Haynes, which indictment and criminal prosecution so instituted is still pending against your petitioner
3 in the circuit court of Grundy County, within the middle district of Tennessee.

And he further shows that no murder was committed; but on the other hand, the killing was committed in his own necessary self-defense, to save his own life; that at the time the alleged act for which he was indicted was committed, he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy collector of internal revenue; and he was acting by and under the authority of the internal-revenue laws of the United States, and was done under and by right of his office, to wit, as deputy collector of internal revenue. It is his duty to seize illicit distilleries and the apparatus that is being used for the illicit and unlawful distillation of spirits,

and while so attempting to enforce the revenue laws of the United States as deputy collector aforesaid, he was assaulted and fired upon by a number of armed men, and in defense of his life returned the fire.

4 In view of these facts your petitioner prays that said cause may be removed from the circuit court of Grundy County to the circuit court of the United States for the middle district of Tennessee for trial, & that a certiorari issue. And as in duty bound he will ever pray.

JAMES A. WARDER
Attorney.

DISTRICT OF MIDDLE TENNESSEE,
County of Davidson:

James M. Davis, being duly sworn, deposes and says that he is the petitioner named in said petition; that he has heard the same read and knows the contents thereof, and that the same is true of his own knowledge.

JAMES M. DAVIS.

Subscribed & sworn to before me this Aug. 13, 1878.
J. W. CAMPBELL,
U. S. Com'r for Middle Tenn.

I, James A. Warder, do hereby certify that I reside in the middle district of Tennessee; that I am an attorney and counsellor at law in the supreme court of the State of Tennessee, and also in the

5 circuit court of the United States for the middle district of Tennessee, and as counsel for the above-named petitioner I have examined the proceedings against him, and have carefully enquired into all the matters set forth in the petition, and I believe the same to be true.

JAMES A. WARDER,
Counsel for Petitioner.

2nd. If removable from the State court, is there any mode and manner of proceedure in the trial prescribed by act of Congress?

3rd. And if not, can a trial of the guilt or innocence of the defendant be had here?

And upon the request of the said B. J. Lea, attorney-general, this difference of opinion is stated under directions of the court, and by consent of parties is ordered to be certified to the present term of the Supreme Court of the United States together with a transcript of the record and proceedings in the cause.

JOHN BAXTER.
CONNALLY F. TRIGG.

6 UNITED STATES OF AMERICA,
District of Middle Tennessee:

I, Lewis T. Baxter, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true copy from the minutes.

Given under my hand and seal of office at Nashville, Tenn., on the 17th day of January, 1879, and of the Independence the 103rd year.

[SEAL.] LEWIS T. BAXTER, *Clk.*

(Indorsed:) No. 2137. State of Tennessee *vs.* James M. Davis. Certificate of division in opinion.

(Indorsement on cover:) No. 1085. The State of Tennessee, plaintiff, *vs.* James M. Davis. M. Tennessee, C. C. U. S. Certificate of division. Filed 20th February, 1879.

SUPREME COURT OF THE UNITED STATES.

No. ~~1095~~ 720

STATE OF TENNESSEE, Plaintiff,

vs.

JAMES M. DAVIS, Defendant.

Brief and Argument for Plaintiff.

By BENJ. J. LEA,

Attorney General of the State of Tennessee.

BRIEF.

1. The words "criminal prosecution" in section 643 of the Revised Statutes of the United States, should be construed with reference to every other part of the Revised Statutes on the same subject, and have reference to acts of revenue officers therein declared to be offenses, and have no reference to prosecutions for *murder*, which is not an offense by the Revised Statutes except upon the high seas, &c.

2. If Congress intended by said section to remove trials from the State to the Federal Courts, the act is unconstitutional. There is neither an *express* or *implied* power in the Constitution giving to Federal Courts jurisdiction of crimes which are offenses *alone* against the State. *United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheaton, 415; *Moore* v. *People of Illinois*, 14 How, 13.

3. If said section was constitutional, the United States Circuit Courts could not try a case of murder, having no common law jurisdiction in criminal cases, but a limited jurisdiction to such offenses as Congress, by legislative act, has defined to be a crime and affixed a punishment. And Congress has not by legislative act made *murder* a *crime* or affixed a *punishment*, except murder upon the high seas, in the District of Columbia, and in forts, magazines, arsenals and dock-yards. *United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheaton, 415; *United States* v. *Worrall*, 2 Dallas, 384; *United States* v. *Armstrong*, 2 Curtis, —; *United States* v. *Bevans*, 3 Wheaton, 336; *United States* v. *Pirates*, 5 Wheaton, 184; *United States* v. *Wiltberger*, 5 Wheaton, 76.

4. Admitting the right and power of the United States Circuit Court to try a case of murder, the *statement of facts in this petition* are not sufficient to warrant the court to take jurisdiction under said section 643.

STATEMENT OF THE CASE.

The defendant, James M. Davis, a citizen of the State of Tennessee, was indicted in the Circuit Court of the State, in the county of Grundy, for the murder of James B. Haynes, also a citizen of the State of Tennessee. On the 29th of August, 1878, he filed his petition for *certiorari* in the Circuit Court of the United States for the district of Middle Tennessee, alleging, among other things, that "the killing was committed in his own necessary self-defense, to save his own life; that at the time the alleged act for which he was indicted was committed, he was, and still is, an officer of the United States, to-wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy collector of internal revenue; and he was acting by and under the authority of the internal revenue laws of the United States, and it was done under and by virtue of his office, to-wit, as deputy collector of internal revenue." Upon the return of the *certiorari*, the State of Tennessee, by its Attorney General, moved the court to remand the cause to the State court in which the indictment was found. The motion was heard before the Hon. John Baxter, Circuit Judge, and the Hon. Connally F. Trigg, District Judge, presiding. The Judges were divided in opinion upon the following questions, which they have ordered certified to this court for adjudication:

First. Is an indictment of a revenue officer found in a State court, for murder, under the facts alleged in the petition for removal in this case, removable to this court under section 643 of the Revised Statutes of the United States?

Second. If removable from the State court, is there any mode and manner of procedure in the trial prescribed by the act of Congress?

Third. And if not, can a trial of the guilt or innocence of the defendant be had in the United States Circuit Court?

ARGUMENT.

Revised Statute, section 643: "Where any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such revenue officer, and affects the validity of any such revenue law," may be removed, &c.

This statute is almost an exact copy of the act of 1833, except in its grammatical construction, which makes it entirely a different act. The act of 1833 was passed for the purpose of meeting a state of things in South Carolina in which the validity of the statutes of the United States were denied, and where, by reason of the statutes of the State denying the validity of the acts of Congress, or of State authorities in some form denying their validity, the trial of a cause against a revenue officer would of necessity affect the validity of the revenue law. By said act all suits, civil or criminal, *affecting the validity of the revenue laws* might be removed, &c. By section 643 Revised Statutes, which is the act of 1866, any civil suit or criminal prosecution against a revenue officer may be removed, without the qualifying sentence "affecting the validity of the revenue law." It is true that this sentence is used in the act, but by its grammatical construction it only applies to suits "against any person holding property or estate by title derived from any such revenue officer." It is therefore insisted that any decisions of this court in reference to the act of 1833 are not applicable to this case. A similar case has never been before this court for adjudication,

and, in my opinion, a more important question was never submitted for the determination of any court, vitally affecting, as it does, the rights of States and of our system of government.

It is insisted, *first*, that neither by the act of 1866 nor the former acts of Congress was it intended that cases of this character should be removed from the State to the Federal courts before trial. Although the first part of the act uses the words "civil suits and criminal prosecutions," yet it must be construed with every other part of the *Revised Statutes* upon the same subject. Congress certainly meant a "criminal prosecution" for some offense—some act or thing done—in the collection of revenue which is provided for in the *Revised Statutes* and made an offense against the United States. Numerous acts of revenue officers are made offenses against and punishable by the United States and in the United States courts. It is insisted that the words "criminal prosecutions" can be construed and held to be applicable only to offenses committed by revenue officers *which are defined* and for which revenue officers may be indicted in the Federal courts. Neither the act of 1866 nor any other act of the United States makes *murder* a crime, except committed on the high seas and in the District of Columbia, forts, arsenals, dock-yards, &c. This easy and natural construction should have been given to the act, and the case, being an indictment for murder, should have been remanded to the State court.

But if, by the act of 1866, it was the intention of Congress that all criminal prosecutions against revenue officers, including murder, arson and robbery, should be removed from the State courts to the Federal courts before trial, and the act does so provide, it is insisted that the act is unconstitutional. That the State court has jurisdiction to try the case, is too plain for argument. The murder was committed by a citizen of the State upon a citizen of the State, within the jurisdiction of the State court, and is a crime against the State. The Constitution of the United States is a grant of *specific* powers, and no powers not therein *expressly* given, or by *necessary implication* can be claimed or exercised by the government. By the Constitution itself, Article 10, "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people."

The criminal jurisdiction of the Federal Government extends "to provide for the punishment of counterfeiting the securities and current coin of the United States, to define and punish piracies and felonies committed on the high seas, and offenses against the laws of nations, and also to exercise exclusive legislation over the District of Columbia, and all places owned with the consent of the States and occupied as ports, magazines, arsenals, dock-yards, and other needful buildings." There being no express power giving to the Federal Courts jurisdiction of crimes against the State, is it an *implied* power?

In the case of the *United States* v. *Hudson and Goodwin*, 7 Cranch, 32, the court say, "Certain implied powers must necessarily result to our courts of justice from their institution, but jurisdiction of crimes against the State is not among those powers." This case was afterward cited, approved, and adhered to in the case of the *United States* v. *Coolidge*, 1 Wheaton, 415. In the case of *Moore* v. *The People of Illinois*, 14 How., 13, this court held that the right to make their own regulations for the punishment of crime had never been ceded by the States to the Federal Government. But suppose the power, either express or implied, is found in the Constitution, yet there has been no legislative authority making murder a *crime* or affixing a *punishment*, could an indictment for this offense have been found in the United States Circuit Court? Certainly not, because it is no offense against the laws of the United States. Never, in all the history of the government, has such an indictment been found in the United States Circuit Court. The removal before trial gives the court original jurisdiction, and permits a trial of a cause of which confessedly it has no jurisdiction to find an indictment. In the case referred to in 7 Cranch, 32, this court say, "The legislative authority of the Union must first make an act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offense."

There being no act of Congress making murder a crime, or affixing any punishment, has the United States Circuit Courts common law jurisdiction in criminal cases. In the case to which reference has been made, this court say, "The power which Congress possesses to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to par-

ticular objects, and when a court is created and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended—in its nature very indeffinite—varying in every State in the Union, and with regard to which there exists no definite criterion of distribution between the District and Circuit Courts of the same district." See *United States* v. *Coolige*, 1 Wheaton, 415. In the case of *United States* v. *Worrall*, 2 Dallas, 384, the Circuit and District Judges were divided as to whether an indictment could be sustained in a United States Court for an attempt to bribe the revenue commissioner, there being no act of Congress declaring it a crime and prescribing the punishment. In the opinion of the Circuit Judge an indictment at common law could not be sustained in the Circuit Court. It was admitted that Congress was authorized to define and punish the crime of bribery, but as the act charged as an offense in the indictment had not been declared by law to be criminal, the courts of the United States could not sustain a criminal prosecution for it. The United States, in their national capacity, have no common law, and their courts have not any common law jurisdiction in criminal cases, and Congress had not provided by law for the offense contained in the indictment, and until they defined the offense and prescribed the punishment he thought the court had not jurisdiction. 1 Kent, 333.

In the case of *United States* v. *Aaron Burr*, in 1807, the Chief Justice of the United States declared that the expression, *trials at common law*, used in the 34th section of the judiciary act, was not applicable to prosecutions for crimes. It applied to civil suits, as contradistinguished from criminal prosecutions. 1 Kent. Crm., 333. But suppose the Circuit Court takes jurisdiction and proceeds to trial, how many challenges will be allowed the United States? How many will be allowed the defendant? Of what grade of murder will the jury be instructed, that they may find the defendant guilty? The laws of the United States have not said. Who prosecutes the case in behalf of the United States? Not the United States District Attorney, for he is defending the defendant under instructions, as he informs me. The Attorney General of the State has no right, as an officer of the State, to prosecute in the United States Circuit Court. There being no punishment for the offense, nor any mode or manner of trial

pointed out by the laws of the United States, he could not be tried according to the laws of Tennessee, for the Chief Justice of the United States declared, in the case of the *United States* v. *Burr*, "that the laws of the several States could not be regarded as rules of decision in trials of offenses against the United States, because no man could be condemned or prosecuted in the Federal Courts on a State law." No, no. There would be no trial, and the defendant, though he may be guilty, would go unpunished. In the forcible and expressive language of District Judge Brown, the case *ex parte* Waddy Thompson, he asks, "May a Deputy Marshal, holding a capias of this court, deliberately murder the party he is seeking to arrest?" And he adds, "There is no general power in the Federal Courts to punish murder, and if discharged from the custody of the State, his crime would go practically unpunished." 15 Am. Law Reg., 529. It is thus seen that this is a vital question. This removal strikes down and destroys the power of a State to protect its citizens from and against the assassin, the burglar, the robber. The officer and soldier, by the revised statutes, in time of peace, who are accused, of murder, shall be turned over to the authorities and courts of the State where it is alledged the offense was committed for trial, but a deputy revenue officer may not only seize and destroy property without warrant or without trial of law, but may, within the jurisdiction of a State, steal and burn the property of its citizens, and then murder its citizens, and when indicted in the State courts, remove the cause to the United States Circuit Court, which has no power or authority under the law to try the same. So startling a proposition will not be received until this court shall have so declared. The fact that the accused is a revenue officer under the United States by no means makes the killing an offense against the United States. The Government may be interested in protecting its officers, but not in punishing him, unless it was in some sense a crime against the United States. It may punish its officer for any delinquency in office, for embezzlement, or for corruption in office, but for murder within the jurisdiction of a State it cannot punish. The offense is alone against the *peace* and *dignity* of the State, and not against the United States.

This court has upon more occasions than one refused to invade

the jurisdiction of States in such cases. *United States* v. *Armstrong*, 2 Curtis R.; *United States* v. *Bevans*, 3 Wheaton, 336; *United States* v. *Pirates*, 5 Wheaton, 184; *United States* v. *Wiltberger*, 5 Wheaton, 76. And in some of the cases holding that when a blow was struck upon the high seas, and the death occurred upon the land, that even in such a case the Federal Courts had not jurisdiction. By an act passed 1789 the courts of the United States were organized, and with such wisdom that though nearly a century has elapsed, and though our population has increased from an insignificant number to near fifty millions, the same system to-day remains with but little change or alteration—the admiration and pride of every American. Through all this long period there has been no violent judicial clash between the States and the Federal Government. The rights and sovereignty of the General Government in the powers conferred have been maintained. Crimes against the States have been tried by the State courts; crimes against the United States have been tried by the United States courts; and an act which was a crime against both the State and the United States have been tried by both. If, upon a trial in the State court, the defendant should attempt to justify or excuse himself on the ground that he was acting under and by authority of a Federal law, and this authority was disregarded, then he could appeal to the Supreme Court of the State, and by writ of error could bring his case to this court, for since the cases of *Martin* v. *Hunter*, 1 Wheaton, 304, and the case of *Cohens* v. *The State of Virginia*, 6 Wheaton, 264,—the opinion in the one by Judge Story, and the opinion in the other by his peer Judge Marshall,—it has never been questioned that a State question with a Federal element in it could, *after going through the State courts*, be subject to revision by the Supreme Court of the United States. This remedy here given is a natural and easy one and has the merit of being established by the Federal Government, and has received the cheerful acquiescence of all the States.

But in conclusion the attention of the court is called to the manner in which the first question of division by the court below is stated. Is an indictment of a revenue officer, found in a State courts *under the facts alleged in the petition for removal in this case*, removable to this court under sec. 643 of the Revised Statutes of

the United States? It was evidently questionable with the court whether the *facts alleged* in the petition were *sufficient* to warrant the removal, although the act granting the power of removal be constitutional. The petition alleges that "the act for which he was indicted was performed in his own *necessary self-defense.*" The language of the statute is "on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law." It will not do to hold that it is sufficient, in order to vest a jurisdiction or sustain an action, that a Federal officer was concerned or affected by the act, for, as has been well said, "this would open a source of jurisdiction which would destroy all the barriers between the judicial authorities of the State and the General Government." But although this court may decide that the facts stated in this petition are not sufficient to authorize a removal, I earnestly request that the question of jurisdiction of the United States Circuit Courts to remove these cases for murder, from the State courts, be determined and settled. The question is constantly recurring, and it depends upon a mere accident in a criminal case—the judges disagreeing upon a question of law—whether a case can be brought from the Circuit Court to this court. *United States* v. *Tyler*, 7 Crouch, 285; *United States* v. *Wiltburger*, 5 Wheaton, 76; *United States* v. *Smith*, 5 Wheaton, 153; *United States* v. *Marigold*, 9 Howard, 565; *United States* v. *Holmes*, 5 Wheaton, 412. This accident has occurred, and the case is here for adjudication, and we hope it will be determined upon its merits and thus an end put to the threatened conflict of jurisdiction, and so settled that while those who violate the revenue law of the United States, and hinder and obstruct its execution, are punished, that those officers who so far forget themselves as to rob and murder, will likewise be tried and, if guilty, punished. To allow the removal before trial to the United States Circuit Court, with the District Attorney General to defend, no one to prosecute, and no one to procure the attendance of witnesses, is simply a farce, and if this case is removed, although it may be developed in the proof that J. B. Haynes, whom he is charged with murdering, was at the time on the public highway on his way home with medicine for a sick and dying wife, and never was connected in any way, shape or form with

any still-house, and never knew that any revenue officer was present until the defendant, without provocation, shot him in the back, yet he would go unpunished because no offense against the United States, no officer to prosecute, no mode or manner of trial prescribed by act of Congress.

Benj J Lew attorney
State of Tennessee

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF TENNESSEE, APPELLANT,
vs.
JAMES M. DAVIS.

OCTOBER 22, 1879.

Closing Argument of HON. J. G. FIELD, *Attorney General of Virginia, for the Appellant.*

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF TENNESSEE, APPELLANT,
vs.
JAMES M. DAVIS.

OCTOBER 22, 1879.

Closing Argument of HON. J. G. FIELD, *Attorney General of Virginia, for the Appellant.*

May it please your Honors:

My friend, the attorney-general of Tennessee, spoke truly when he said that Virginia felt a deep interest in the question now being discussed before your honors, and he acted very generously, when he invited me, as the attorney-general of Virginia, to take part in this discussion. However deep the interest felt in this case by Virginia, she would willingly have left it to the able advocacy of my distinguished friend, the attorney-general of Tennessee; but as he has very courteously invited me to take part in the argument, I feel that I would be wanting in a just appreciation of his kindness, if I failed to do so.

In appearing under these circumstances, I do not feel, may it please your honors, that I am before you as a volunteer. Far otherwise. My state has both a general and a special interest in the questions to be decided in this case; a general interest as one of the states in the Union, upon which the decision in this case will be binding, and to which the proceedings of her courts will be conformed—a special interest, because

there are now pending in Virginia two or three cases similar to the one at bar, waiting, by agreement, for final disposition, the decision of your honors in this case.

I am here then in the discharge of a high public duty, and I am glad that in this case no sectional issue is raised.

The questions raised are of great interest and of general application, applying to all the states alike, unaffected by previous institutions, either political or social.

I am here, however, may it please your honors, to speak as best I may, as a lawyer addressing a legal tribunal.

I hope I shall be excused, therefore, if I say but little upon the political aspect of this case which has been quite prominently introduced into the brief and oral arguments, of the learned attorney-general of the United States and his assistant. They seem to be devoted students, though not disciples, of South Carolina's great statesman and political philosopher. They incur the labor apparently of setting up some of Mr. Calhoun's tenets for no other reason than that they might have the pleasure of knocking them down.

With submission, I do not believe that the political question as to whether this Union of ours under the constitution, derives its existence and powers from the states, or from the people, has anything to do with the practical question now under discussion.

Nor is it necessary for me to debate with my friend, the attorney-general, the question raised by their brief as to whether the United States is a nation or a federal union. I will agree with them that it is not a mere league, as they interpret league. But I dissent from the opinion of my brothers that it is a nation, if they use the term nation in the sense of an unrestricted government.

I hardly think either of my friends would be willing to strike from the national motto the first two words, *E Pluribus*. It is not a nation in the sense of absolute government, nor is it a league in the sense in which the original confederation of states was a league. Our government, while not a centralized government, is a central government, but a central government with expressly delegated powers—powers delegated by a written instrument called a constitution. To the extent that those powers have been granted, I care not whether the government is called national or federal. I prefer to call it federal, because it was so named and baptised by the fathers. To the extent of its delegated powers, I not only admit, but I claim as one of its citizens, entitled to its protection, that it is sovereign.

I insist, and I do so as a states-rights man, born and reared in the Virginia school of states-rights, that it is no infringement of nor derogation from the reserved rights and franchises of the states for the government of the Union, through its judiciary, to go into the states for the purpose of executing the laws of the Union, and of securing to citizens rights acquired under and secured by the constitution of the United States and the laws of congress made in pursuance thereof.

The right to the protection of the constitution of the United States, and the laws of congress properly enacted, and duly administered by the judiciary of the United States, is a right pertaining to the citizen of the state, as well as to the citizen of the United States. It was the opinion of the fathers of the republic that they could devise a system of federal and state governments, under which the former could exercise in the states those granted powers, without infringing on the reserved powers of the latter.

The great duty of the hour and of the age is to demonstrate the correctness or incorrectness of this opinion. The experience of a century, I am happy to say, tends strongly to confirm the correctness of the opinion, and the profound wisdom of our fathers.

Then, with these general remarks, and averring most distinctly in advance that so far as the constitution and the laws of congress made in pursuance thereof is concerned, and so far as their execution in the states is concerned, through the judiciary of the United States, I have not one word of complaint. Indeed, I claim it as our right to have administered by the United States courts, the laws of the United States made in pursuance of the constitution.

Let us come now, may it please your honors, to discuss, as purely judicial questions, the three interrogatories that have been propounded to your honors from the United States circuit court of Tennessee. The first interrogatory will be found on page one of the record, and is as follows:

"Is an indictment of a revenue officer found in a state court, for murder, under the facts alleged in the petition for removal in this case, removable to this court under section 643 of the Revised Statutes of the United States?"

2d interrog.: "If removable from the state court, is there any mode and manner of procedure in the trial prescribed by act of congress?"

3d interrog.: "And if not, can a trial of the guilt or innocence of the defendant be had here?"

Allow me, now, to say that notwithstanding the intimation of my learned brothers, the attorney-general of the United States, and his assistant, Mr. Smith, that the two last questions are not properly addressed to this court, because they are seeking information as to what shall be the future policy of the court in the trial of the case if it shall be retained there, is not correct.

In the argument which I am about to submit to your honors, I shall endeavor to show that the proper answer to the second and third interrogatories, will tend to a very great extent in arriving at a just and proper answer to the first interrogatory, and that my friends are mistaken in the view which they have taken of the last two interrogatories, if they have formed the opinion that they are merely abstract and not pertinent to the questions which it shall be proper for this court to consider and determine.

May it please your honors, allow me to say that I do not, and that the learned attorney-general of Tennessee does not, question the authority of Martin *vs.* Hunter, or of Cohens *vs.* Virginia. Indeed, I will say for him, as I now do for myself, that we rely upon these two cases as sustaining the position which we now assume before this court.

We think that the questions raised and decided in each of those cases go to demonstrate that our view of the duties of United States courts in dealing with the offences of the character disclosed in this record is the true one, *if, indeed, it is not the only one.*

It has never been denied, that under section 709 of the Revised Statutes, the right of removal exists by a writ of error from the court of last resort in the state, to this court, of any case whatever, civil or criminal, in which there is a right derived from the constitution of the United States, or through any law of congress, passed in pursuance of the constitution of the United States. We concede the right of this court in all federal questions to determine the rights of parties, if those rights shall be denied in the state by the court of last resort.

If in the state courts, the decision of those courts is against the right which is claimed under the constitution or under a law of congress, then we say that from the very foundation of the government (and I date the foundation of the government at the time when this act—the judiciary act—was passed) down to the present time, it has never been questioned that there was a right to bring the case to this court for the purpose of having its decision upon all questions

arising under the constitution of the United States. That is all that Martin *vs.* Hunter, and it is all that Cohens *vs.* Virginia established.

It is true that Judge Story in the one case, and Chief Justice Marshall in the other, argued to show, that the right of removal—*of course in a proper case*—must exist before final judgment. The exigencies of our case, which we are now discussing, do not devolve upon us the necessity of denying that argument. I think that I shall be able to show you in the progress of this argument, that this case, at the time this application for removal was made, was not a case which, under the reasoning either of Justice Story or Chief-Justice Marshall could have been removed into the circuit court of the United States for final trial.

In discussing the right of removal, there necessarily comes along with it that cognate question, as to the right of trial; and I submit that if this court should believe that under the constitution of the United States, congress has authority to have removed from the state courts, such cases as this into the circuit court of the United States for trial, yet if congress has failed to provide appropriate legislation, not only for the removal of the cause, but for its trial and final disposition, then this court will stay its hand; this court will not take possession of a cause of which the state court has rightful jurisdiction, when the powers of this court are simply limited to its removal.

What will you do with it? If the case is removable, then it is a fair presumption that it is triable, and that congress, which provided for the removal, has provided for the trial and final disposition of the case. Now, may it please your honors, if upon examination of the statutes of the United States it shall appear that congress has made no appropriate provision for the trial and final disposition of the case, we must conclude that one of two things is true—first, that congress did not intend that the removal should take place at the particular time and in the particular way; or second, that there has been an omission on the part of congress to provide proper legislation for the trial.

In the light of the past history of this government of ours, and of this question, it is hardly to be supposed that it is a case of omission on the part of congress. If I understand the argument of my learned brother upon the other side, this right of removal has existed since 1789. There has never been a session of congress from that time down to the present in which the legal profession of the country was

not only numerously but ably represented; and if it had been the intention of the judiciary act, that such causes as this should be removed at the time and in the stage of proceeding at which this application was made for removal, can it be supposed that congress would not have provided definitely and distinctly the *modus* of trial? I submit that it cannot.

Your honors will look to the statutes of the United States, and you will find that page after page, and chapter after chapter are occupied in declaring offences against the United States government in some of its branches—either its currency or its internal revenue—and yet in all those numerous cases there is not a single instance in which, where congress has declared an offence that it has not provided the specific manner and mode of trial and punishment.

Then, if that has been the uniform course of congress, can it be averred that congress intended to confer upon the circuit court of the United States the authority to remove such a case as this, and yet not provide specifically for its trial?

My learned friend, the able attorney-general, concedes that as to the *modus* and manner of trial, there is a difficulty. He not only states his propositions fairly, but he never states them dogmatically. And I say it is a most remarkable condition of the law and of this government, if it is true that such a case as this is removable, that the learned, able and experienced attorney-general, whose life has been devoted to his profession, and of which profession he is an ornament, should be compelled, as in this case, to say to your honors, that so far as the *modus* and manner of its trial are concerned, if it should be retained in the circuit court, there is grave doubt and difficulty.

I want now to call your honor's attention to another remarkable fact. Though this act of 1789, which contains this clause of removal, has been in existence for nearly an hundred years, and though all the errudition and learning of all the ages have been exhausted, yet my friends upon the other side in the multitude of cases which they have produced, and to which they have invited the attention of your honors, have utterly failed, up to the present time, to call your honor's attention to a single case of this character which has ever been *removed and tried* in a court of the United States. There is not one.

May it please your honors, it has been announced from this bench during the present session of the court, as it has been announced from the bench from the earliest days of its existence down to the present

time, that this court will not, and that no court should declare an act of the legislature unconstitutional unless it is plainly so. This is held everywhere. There is no lawyer, no judge, no court anywhere, that will controvert that general proposition. Now, I desire to state a corollary to that proposition. This court will not exercise a doubtful jurisdiction in a criminal case where the state court has a clear original jurisdiction. It is the duty of this court, and it has always been its pleasure, and will continue to be its pleasure, to so administer the laws of the United States as to produce no unnecessary conflict of jurisdiction with the state courts. And if its jurisdiction is doubtful, and their jurisdiction is clear, this court will leave those courts in the exercise of their clear and well defined jurisdiction rather than to tread some uncertain path, some unexplored highway (if a highway may be said to be unexplored) in the exercise of its jurisdiction. I think I can safely ask this court that if when they shall go into their consultation chamber to consider these grave and important questions, affecting every state in this union to a greater or less extent; affecting also every individual in this union—when they come to consider of their judgment upon this record, unless their minds are satisfied that there attaches a clear and well defined jurisdiction in the circuit court to remove and to try this case, they will not undertake to assume that jurisdiction. I say that they will leave the state court in possession of the case, first, because it would be their duty to do it; and, in the second place, I say they will do it, because the books are full of the mode and manner by which the defendant in this case can by writ of error obtain the full benefit of the laws of the United States administered by a court of the United States, and that court, the court of last resort.

So that there is no danger of wrong to this individual, for if he shall be tried and condemned in the state court contrary to the constitution of the United States and the laws of congress, all he has to do is to ask for his writ of error, and do what section 709 of the Revised Statutes says he may do: have the decision of the state court reviewed, and if erroneous, reversed. Then I say, if there was no well-defined remedy, yet if there was a doubtful jurisdiction in the circuit court, the circuit court ought not to exercise it. It ought not to exercise it if it is doubtful, because there is a plain and adequate remedy about which there is no doubt whatever.

May it please your honors, my friends upon the other side will not

deny the general proposition, because it has been decided over and over again by this court in probably fifty cases, that the state courts alone have the right and the power to punish offences against state laws. That will not be questioned; it cannot be questioned.

Mr. Justice HARLAN:—Might not congress provide for the indictment of an officer of the revenue, who, in the execution of the duties of his office, committed an offence against the laws of a state?

Mr. FIELD:—I am coming to that, and I think the line of my argument will be exactly in harmony with the suggestion of Mr. Justice Harlan, when I come to discuss that branch of the case. I say that the general proposition will not be denied that all offences against state laws must be punished by state tribunals. If I do not mistake, Mr. Justice Swayne, in delivering the opinion of the court in the case of the Mayor *vs.* Cooper, declared that jurisdiction must be conferred upon the court by the constitution, and then its mode of exercise must be prescribed by congress.

(I am not certain whether I have quoted from Judge Swayne or from some other member of the court.)

Mr. Justice SWAYNE:—I remember the precise language used, which was that the constitution must give capacity, and then the jurisdiction can be conferred by congress.

Mr. FIELD:—Your honor is more accurate in remembering the language than I am. I did not think I quoted the language exactly, but the idea is the same. It now becomes my province to inquire not only whether congress has conferred this jurisdiction, but whether congress has provided the means of its exercise.

I desire to state at this point that I do not question the right, to the fullest extent of the courts of the United States, to protect their officers in the due execution of their process in the states. I say that they not only have the power, but that it is their highest duty to protect those officers, and I hesitate not to say that if it were necessary to do so, the whole power of the government of the United States should be placed at the disposition of the court for that purpose. It is not only right that it should be so, but this court could not possibly preserve its dignity without so doing. When it puts its mandate into the hands of its officer and sends him forth into the state, into which he has a right to go for the purpose of executing that process, it should protect him, and protect him at all hazards.

So let me not be misunderstood here. I want to be as distinctly understood here as upon the other branch of the case, to-wit: that where a federal question is concerned, where any question arising under the constitution or laws of the United States is involved, and that right is denied, that the rightful jurisdiction attaches to the United States courts for the enforcement of that right and its protection.

May it please your honors, it is claimed that this removal was a proper exercise of authority under section 643 of the Rivised Statutes. My friends have felt it necessary for some purpose or other, I know not what, to insert in their brief sections 641 and 642. I do not know why they have been so inserted, because unless this jurisdiction can be maintained under section 643, it cannot be maintained at all. Sections 641 and 642 relate to a wholly different subject; there is no connection the one with the other whatever. The right of removal may exist under section 641 and may not exist under 643, and again it may exist under 643 and not under 641.

Section 643 is as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any officer on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States or other person on account of any act done under the provisions of Title XXVI, 'THE ELECTIVE FRANCHISE,' on account of any right, title or authority claimed of such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending," &c.

Now there are certain things that must concur before the right of removal exists under this section. What are they? The official relation must exist between the party and the government of the United States. Then there must not only exist the official relation, but the act complained of must have been done in pursuance of official functions resulting from that relation, or done under color of the office.

I hardly think that these propositions will be questioned. Now, in the first place, the official relation exists, and in the second place, the act complained of must have been done in pursuance of official functions, or under color of official functions. Does this record present a case in which those propositions concur, in which those ingredients are found? I think it does not.

My friend, the assistant attorney-general, in his argument yesterday stated, of course unintentionally, and it was a mistake on his part, that one of the duties devolved upon this man at the time of the alleged homicide was to arrest the parties. He is mistaken. It is not so averred in the petition, and it is not so under the law. What was it that he could do as a revenue officer under color of his office at the time of the alleged homicide? Why, he could seize this distillery, if it was an illicit one, but he could make no personal arrest. He was not armed with a warrant for personal arrest. If he had undertaken to arrest the party, he would have been liable in an action of trespass, and the United States could not have afforded any protection, because to have undertaken to arrest anybody would have been outside of his authority under the law under which he was acting.

Mr. Justice MILLER:—It is not stated, I think, in the petition that he was attempting to arrest anybody.

Mr. FIELD:—That is just what I claim, and I state that my learned friend, the assistant attorney-general, made a mistake when he stated that it was his duty to arrest. He had no authority to arrest this person at all, or to put his hand upon him. He had a right to seize the property which was being used for this illicit purpose, but there his power ceased.

Mr. Justice HARLAN:—The petition alleges that while doing that he was assaulted, he returned the fire, and the man was killed.

Mr. FIELD:—Was it so necessarily? That is the question. Was the killing under color of the office? That is the very point. We say that it was not—that he had nothing to do with the person of this party.

Mr. Justice HARLAN:—That is not the point, if you will excuse me. He says he was an officer and asserts that it was his duty to seize illicit distilleries being used in the fraudulent distillation of spirits, and that while attempting to enforce a revenue law—while attempting to seize these distilleries—he was assaulted and fired upon by a band of armed men, and in defence of his life he returned the fire.

Mr. FIELD:—That brings up the question of self-defence. Self-

defence was a right under the common law, or natural law, and without any reference whatever to a congressional enactment.

Mr. Justice HARLAN:—Could he be indicted for an act done in pursuance of his authority and while performing his duty? Do you say a man has no right to defend himself while an officer?

Mr. FIELD:—No, sir, I do not; but I say this: that if, in the doing of the official act, if that official act is not to take possession of and arrest the party, he commits a homicide, it cannot be said that he is doing that in the discharge of his duty. That is what I claim.

Mr. Chief-Justice WAITE:—Then your theory would be this: that if this man was at this distillery performing his duty, under the law, of destroying that distillery, and he was attacked by an armed force from the outside, and in self-defence he fired back, and the man was killed, he must be tried for that offence in the courts of the state, and cannot be tried in the United States courts?

Mr. FIELD:—Yes, your honor; I say so. That is my interpretation.

Mr. Chief-Justice WAITE:—Then because the authority under which he was acting did not authorize the killing—

Mr. FIELD:—May it please your honor, his authority under which he was acting did not contemplate the act which he did.

Mr. Justice HARLAN:—Suppose an armed man had stood between this official and the distillery as he was about to seize it, and had said to him: "If you attempt to seize this distillery I will kill you;" had he not a right to put that man out of the way?

Mr. FIELD:—The law of Congress does not provide that anyone who intervenes under these circumstances may be killed, because the killing would not be necessary to the taking possession of the property. The officer could have gone off; the property could not have been removed; there it stood, and he could have summoned a force sufficient to come there afterwards and remove the party without the killing. But if the killing ensued, then I say that the killing was not under the color of his office, but it was an act justified by the law of nature—the right of self-defence, and which any court and all the courts would have protected him in exercising.

Mr. Justice MILLER:—In answer to that, suppose this man had been no officer, and had had no authority from the United States whatever to interfere with the distillery, do you think the cases would stand on the same ground, and that the fact that he had such authority, gives him no immunity under the law of the United States?

Mr. FIELD:—No, sir; I do not think it stands upon the same footing. If he had had no authority and had gone there to take possession of the distillery, then under many decided cases the party in defense of his property, or of himself, might have killed him, and not have been guilty of murder.

Mr. Justice MILLER:—The very purpose of the law, it seems to me, is to give to the federal courts jurisdiction to try the question whether the authority or color of office there mentioned was a sufficient defense. If the law had any meaning at all, it meant to remove the trial of that question whether the authority set up—the conduct which he was pursuing as an officer—was a sufficient defense to the charge made in the state court against him. To try that, must have been the purpose of the statute.

Mr. FIELD:—If this indictment had come to trial, I suppose the plea would have been not guilty, and the question would have been as to the guilt or innocence of the party, and that guilt or innocence would depend upon the circumstances under which the homicide was committed. Now, I can very well suppose, and there are cases in the books saying that where a party was authorized to take a person, and that person resisted, and killing ensued, where the process of arrest issued from a United States court, or from the officers of the United States, there most clearly would have been an act done under color of office. For instance, suppose your honors should, if you have a right to do so, issue such a process to your deputy marshall to arrest the person of A. B., charged with an offence in the state of Virginia. You send your deputy marshal into that state. That person, instead of submitting to arrest under the law, as it would be his duty to do, undertakes to resist your officer and to prevent the execution of the warrant, and his death ensues. That is a case that would clearly come within the protection of the law as an act done under color of office.

Mr. Chief-Justice WAITE:—Suppose that it was simply to take possession of property, and the owner of that property resisted by an assault on the officer, is the case any different?

Mr. FIELD:—I think the case is different, simply because the law of congress which he was executing did not contemplate that he should be authorized to kill; and if authorized to kill at all, his authority was derived from some other law than an act of congress.

Mr. Justice HARLAN:—If he was not authorized to kill, was he not authorized to use the necessary force to remove any obstacle out of he way of the execution of his duty?

Mr. FIELD:—He had a right to use whatever force might have been necessary for taking possession of the property which the law of the United States declared forfeited; but in so doing he must take care not to violate any other law, and if he violated a law in the execution of that mandate, then he must rely for his defence upon some other law than that of congress, which did not authorize the act.

Mr. Justice MILLER:—Do you think a *capias* issued to take possession of the man authorized the officer to kill him?

Mr. FIELD:—If he resisted.

Mr. Justice MILLER:—Suppose he trips up the officer and runs away?

Mr. FIELD:—If he runs away, and outruns the officer, the officer has no right to kill him.

Mr. Justice MILLER:—Your agument is that one authority authorizes the man to kill, and the other authority does not.

Mr. FIELD:—No, sir; that is not my argument, may it please your honor. My argument is this: that the killing must have been done under color of office. And I deny that in the case at bar the killing was done under color of office, and I say that the killing cannot be justified by anything contained in the statute, even though the party may be fully vindicated upon the great principle of self-defence when he comes to trial. I do not assume that he is guilty; my friends say that we assume before trial that he is guilty. I will say that the homicide is stated in the petition; that the *corpus delicti* is proved. Now, as to the criminal agent, I am willing to say that, so far as this killing is concerned, we must, in the state courts, presume that he is innocent until guilt is proven. But the question here being discussed is as to where and in what tribunal that question of guilt or innocence is to be determined.

May it please your honors, let me advance. In reference to the question suggested by his honor, Mr. Justice Harlan, as to whether or not congress might not provide that under certain circumstances a man should be indictable and triable in the United States courts, I say this: that if the theory of our brethren upon the other side is the correct one, that congress has the right to remove for trial a case of this sort into the circuit court of the United States, then unquestionably congress would have the right supposed in the question submitted by Mr. Justice Harlan; and I say that it would not only have the right, but that it would be its duty to do so. Why?

Suppose this party is to be tried, and is to be tried in the circuit

court of the United States. Who is to be the prosecutor? In the state court the state will unquestionably be the prosecutor; but the state is a part of the Union, its sovereignty is subordinate to that of the Union, and when this violation of its sovereignty (to-wit: this murder,) was committed, was not the superior sovereignty of the United States also offended, and was it not the duty of the United States to vindicate that sovereignty by trying this party?

But I maintain that if this case is removed, then, from the time that the United States court assumes control of the case, if it has the authority to assume such control, it must be tried and prosecuted in the name of the United States, and at the cost of the United States. Let me illustrate: In the state courts the cases for trial are sent to the court of the county in which the offence has been committed. Suppose when the United States court assumes control of this case, and removes it one or two hundred miles from the county in which the offence was committed, is it to be held that there is devolved upon the state the additional burden of getting up her witnesses and carrying them to some remote part of the state for conducting the prosecution? When the United States intervenes, on the one hand, for the protection of its officer, does it not intervene, on the other hand, for the purpose of protecting the laws of the state which become the laws of the Union? I do not think there can be any doubt about it.

Your honors know that in the states those prosecutions are generally conducted at the expense of the state. Those expenses have to be certified. It is the duty of the judges of the court to certify them. If this prosecution is to be conducted in the United States court, how are these expenses to be incurred, and how are the witnesses to be got to the trial? How is process to issue? Who is to execute it? At whose cost is it to be executed? Will you say that the state shall only try in the United States court upon its coming in and incurring all these additional burdens? Because I think that my friends here have stated that unless the state does come in to prosecute, the party must be discharged.

Now, my friends claim that under section 722 of the revised statutes, the right to try these cases is given. If your honors will turn to that section and examine it you will find that it relates exclusively to another class of cases. It has no reference whatever to the cases that are removed under section 643.

SECTION 722. "The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title

and of title 'Civil Rights,' and of title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause, is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

I think now I have shown that the court ought not to exercise this jurisdiction if it is doubtful, because there is an ample remedy provided by writ of error. But if your honors will turn to section 762 you will find that when congress manifests a determination to interfere for the protection of rights, it provides a remedy. That section relates to the use of the *habeas corpus* for the relief of persons who are charged with the violations of the laws of nations, and provides that the United States courts, by the employment of this writ, may and shall assume jurisdiction and dispose of the case.

Now, where congress has provided for the intervention in a specific way, and to grant specific relief where the law of nations has been violated, would congress have been silent as to the mode and manner of trial in a case such as the one at the bar? I call your honors' attention to the case which has been frequently referred to in 12th Allen—a Massachusetts case.

Mr. Justice STRONG:—The consitution of the United States provides that the judicial power of the United States shall extend to all cases affecting embassadors and consuls. Suppose a consul of France commits murder in one of the states; in what court is he to be tried?

Mr. FIELD:—I suppose the United States under that provision of the constitution would have to make provision for his trial, and if the United States does not make provision, then I do not know where he could be tried at all.

Mr. Justice STRONG:—You think then that the judiciary power vested in the United States courts could not be exercised according to the law of the state where the offence was committed?

Mr. FIELD:—Only in cases which are specified.

Mr. Justice STRONG:—Is it not involved in that very jurisdiction itself that the federal courts can exercise jurisdiction in the manner and according to the state law to punish murder according to the law of the state in which the offence is committed? The offence is against the state.

Mr. FIELD:—Well, may it please your honors, I do not think that in such a case as the one at bar, the United States could, for the reasons that I have tried to elaborate under these general provisions. I do not mean to say now that congress may not; all that I claim is that congress has not made provision for the final trial of this offence, if, indeed, jurisdiction has been conferred upon the United States circuit court for its removal. And from that, I argue that it was not the intention of congress to confer the jurisdiction at all, because it would hardly have conferred jurisdiction without specifying the manner in which that jurisdiction was to be exercised.

As I have about completed the argument in this case, and about consumed the time to which I am entitled, I do hope, as this is a question of great importance, in which all the states and all the people are interested, that it will be the pleasure of this court, if it shall be the opinion of the court that this jurisdiction is the rightful one, to declare the manner and mode in which it is to be exercised to a final disposition of the case. I desire this, because there are cases in my state awaiting the decision in this. In those cases, it is asserted that when removed, the United States by its district attorney is to defend the accused. That the removal is for defence, not for prosecution, of the offender.

Whilst the state, perhaps, might be willing to come in and assist in the prosecution where she has the co-operation of the United States authorities, yet I do not think that it would consist with her dignity to go into a court and try a case in which she would have to antagonize the authorities of the United States. I feel that it could not do so. It is not only important that this court, now that one hundred years have elapsed in which this question has never been settled, to settle it, and to settle it definitely and distinctly. So far as my own state is concerned, I think I may say that she will be rejoiced if this court has the authority to extend its hand and take charge of a large amount of criminal prosecution within her borders, and thereby relieve her from a very heavy burden, and very onerous costs.

I thank your honors for the kind attention given to me.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

TENNESSEE
v.
JAMES M. DAVIS. } No. 1085.

DIVISION OF OPINION IN UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

DEFENDANT'S BRIEF.

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STATEMENT.

At a session of the United States circuit court for the middle district of Tennessee the circuit and district judges differed in opinion upon these three questions, viz:

1st. "Is an indictment of a revenue officer found in a State court for murder, under the facts alleged in the petition for removal in this case, removable to this court under section 643 of the Revised Statutes of the United States?"

Omitting caption and verification, the petition was as follows:

"Your petitioner, James M. Davis, would most respectfully show to the court that on the 21st day of May, 1878,

at the May term of the circuit court of Grundy County, Tennessee, the grand jurors for the State of Tennessee, at the instance of E. M. Haynes, as prosecutor, indicted your petitioner for willfully, premeditatedly, deliberately, and of his malice aforethought, killing one J. B. Haynes, which indictment and criminal prosecution so instituted is still pending against your petitioner in the circuit court of Grundy County, within the middle district of Tennessee.

"And he further shows that no murder was committed; but, on the other, hand, the killing was committed in his own necessary self-defense, to save his own life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy collector of internal revenue; and he was acting by and under the authority of the internal-revenue laws of the United States, and was done under and by right of his office, to wit, as deputy collector of internal revenue. It is his duty to seize illicit distilleries, and the apparatus that is being used for the illicit and unlawful distillation of spirits, and while so attempting to enforce the revenue laws of the United States as deputy collector aforesaid, he was assaulted and fired upon by a number of armed men, and in defense of his life returned the fire.

"In view of these facts your petitioner prays that said cause may be removed from the circuit court of Grundy County to the circuit court of the United States for the middle district of Tennessee for trial, and that a *certiorari* issue. And as in duty bound he will ever pray." (Record, 1, 2.)

2d. If removable from the State court, is there any mode and manner of procedure in the trial prescribed by act of Congress? (Record, 2, folio 5.)

3d. And if not, can a trial of the guilt or innocence of the defendant be had here? (*Ib.*)

The section of the Revised Statutes is this:

"SEC. 643. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of Title XXVI, 'The elective franchise,' or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session; or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the

State court by summons, subpœna, petition, or any other process, except capias, the clerk of the circuit court shall issue a writ of certiorari to the State court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or by some person duly authorized thereto. And thereupon it shall be the duty of the State court to stay all further proceedings in the cause; and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody or [*on*] mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court; or, in vacation, of any judge thereof, and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."

See act of July 13, 1866, c. 184, § 67 (14 Stats., 171), and act of March 2, 1833, § 3 (4 Stats., 633).

Also see the preceding sections 641 and 642 of the Rev. Sts.

Section 641 provides for the removal into the United States circuit court of civil *or criminal* prosecutions

against any person who is denied or cannot enforce in the judicial tribunals of the State, &c., any right secured to him in any law providing for the equal rights of all citizens and of all persons.

Section 642 provides the form of removal of the cause and for the issue of a writ of habeas corpus to bring the person of the prisoner and the process by which he is held to the Federal court for cognizance thereof.

BRIEF.

I.

Some power of removal must be admitted to exist, otherwise the extent of the judicial authority conferred by the constitution would be limited by the will of the plaintiff, or excluded if he chose to bring his suit in the State tribunal. The same argument which proves that it cannot be thus narrowed establishes the legality and propriety of the legislation now brought under consideration.

The convention which framed the Federal Constitution considered fully the necessity, not only of constituting a tribunal which should decide on all cases involving the construction of the Constitution of the United States and the legislation thereunder, but to which should be removed cases in which such questions arose.

Luther Martin, Genuine Information to Maryland Legislature. Federalist, No. 60–65.

If a case may be removed at all, the *time* when it shall be removed from the State court to the United States

court is a question of convenience and expediency only. If removable after a deliberate judgment has been rendered a fortiori, ought it to be before any conclusion has been reached. Mr. Calhoun, in contending against the right of removal of cases arising under the revenue laws, admits that if the right exists at all it may be extended to criminal as well as civil cases, and "to the transfer of a case, civil or criminal, at *any* stage, before as well as after final decision, from the State courts to *either* the Circuit Court or the Supreme Court of the United States, to the exemption of all the employés and officers of the United States when acting under the color of their authority from civil and criminal proceedings in the courts of the States, and subjecting those of the States acting under their respective laws to the civil and criminal process of the United States," &c. (1 Calhoun's Works, 330.)

The judiciary act of 1789 authorized the removal of civil cases *before trial*, and the re-examination of certain cases *after judgment* in the State courts. In 1815 (act of Feb. 4, 1815, § 8, 3 Stats., 198), provision was made for the removal, *before trial*, of suits, civil and criminal, brought against revenue officers, excepting only those cases in which corporal punishment might be inflicted. This was a war measure. It was continued in force five or six years by the acts of 1816 and 1817.

At the time when the enforcement of the revenue laws again became difficult and dangerous a similar statute was passed, which has been in force ever since, made to apply by the act of 1866 to internal-revenue officers, and now incorporated in the Revised Statutes, sec. 643.

In 1833 this subject had acquired unusual importance and prominence through the nullification doctrines then promulgated. President Jackson recommended this law by special message of January 16, 1833. (9 Cong. Deb., pt. ii, p. 53.) Accordingly Congress passed a law, almost unanimously in the Senate (32 to 1) and by a large majority in the House (126 to 34), substantially the same (so far, at least, as the present case is concerned) as the act of 1866, now incorporated in section 643 of the Revised Statutes. Act of March 2, 1833, § 3 (4 Stats., 633); act of July 13, 1866, § 67 (14 Stats., 171, 172).

So far as the right of a State to determine upon the propriety or legality of the conduct of its citizens and residents is concerned, this attribute of sovereignty is circumscribed as well by the enforced removal of a *civil* cause as of a criminal prosecution. It is the ordinary incident of sovereign power to determine upon all *property* rights arising and litigated within the territorial limits of the State, as much as to inquire into personal injuries, or to punish violations of its statutes, and this irrespective of the domicile of either litigant; presence of the person or thing ordinarily giving to the courts of the local sovereign authority to adjudicate all questions proper for judicial decision relating to the individual or property so found in his domain. The difference between the removal of a civil action and of a criminal prosecution is one involving an inquiry as to the *extent* of the constitutional grant of jurisdiction and not as to its *nature*. In principle, there is no distinction; but, from long and frequent usage to transfer civil causes, this divestiture of State authority excites little animadversion. These, it is true, are ordinarily between private

litigants, but those to which corporations created by the State are party are frequently removed; and the Constitution expressly confers jurisdiction over controversies in which a State is engaged with a citizen of another State, and over those in which citizens of different States are concerned, claiming lands which are part of the State's domain, and to which one party sets up a title derived from the State. The sovereignty of the State is affected just the same, whether the cause be taken to the circuit court or necessarily brought originally in this court.

Possibly the objection may be made that the removal takes the whole case—as to its *facts* as well as the law—out of the cognizance of the State tribunal; and that, although the statute might be constitutional if it merely permitted a final revision of the *law* in this court, after final judgment in the State court, it is unconstitutional to remove the cause for hearing upon the facts. The right of removal exists by reason of the appellate power vested in the courts of the United States; and this exists as to questions of fact as well as of law. Not that if a question of fact has once been examined in a State court it is necessarily to be re-examined, but that if it be a case where the examination of the fact is important in the courts of the United States, it can there be made, originally or upon review. This, however, was authorized as to civil cases in the judiciary act of 1789, and has been ever since; and in 1815 in both civil and criminal causes, as hereinbefore mentioned. No reason why the facts in the criminal prosecution should not be determined in the United States court suggests itself that is not also applicable to civil actions. Indeed, for the due execution of the laws, it may be more necessary to remove

criminal cases against an executive officer, in which the jury have so large a power, than mere civil suits. It is a proper interference, so that his own government may determine whether or not such officer has simply performed his duty or has exceeded it. It is the prerogative of sovereignty to ascertain whether or not its officials are faithful or culpable; and any offended sovereign must complain to the sovereign of any officer whose offense is claimed to be done in compliance with the directions or laws of his sovereign. Mr. Forsyth, in debate upon the bill of 1833, thought it might be *expedient* to amend the provision so as to only allow removal *after* judgment in criminal cases, but Mr. Webster objected, thinking this "the most important provision in the bill as respects the protection of the Federal officers," and the amendment was rejected by a vote of 28 to 5. The method of effecting the removal was suggested by Mr. Ewing, of Ohio.

The right of a State to vindicate and preserve its peace is subject to the graver rights of the United States to preserve and vindicate their powers, one of such powers being to pronounce by their own legislature, or at least by their own judiciary, what these powers are. It is a presumption *juris et de jure*, that no statute of the United States, held valid by the courts of the United States, can disturb the peace of a State.

These statutes are constitutional. (Martin *vs.* Hunter, 1 Wheaton, 335; Cohens *vs.* Virginia, 6 Wheaton, 264; Mayor *vs.* Cooper, 6 Wallace, 247; Hodgson *vs.* Millward, 3 Grant's Cases, 416 and 418; State *vs.* Hoskins, 77 No. Car., 530; Venable *vs.* Richards, 22 Int. Rev. Rec., 299, and the other cases below cited.)

This case is brought, by the facts stated in the petition, within the terms of this legislation. (See petition, Record, 1, 2, and ante, 2).

Of course no State would undertake to prosecute in its own courts for offenses which *only* contravened Federal law. The criminal suit subject to removal must, therefore, be one which, on the face of the process, professes to charge the accused with a violation of the laws of the State; and the basis of the removal must be some relation (made to appear upon oath) borne by the act complained of, or by the actor, to the Federal Government and laws. Proof of such relation authorizes the removal. (Hodgson *vs.* Millward, 3 Grant's Cases, 416, 418, and 419; Ex p. Robinson, 6 McLean, 355; Ex p. Jenkins, 2 Wall., jr., C. C., 521, per Grier, J.; same case, *Ib.*, 539; U. S. ex rel. Garland *vs.* Morris, 2 Am. L. Reg., 348; Ex p. Roberts, 2 Abbott's U. S. C. C. Rep., 265.)

The distinction made by Ballard, J., in United States *vs.* Roberts (2 Abb. C. C., 279), is a just one. The defendant does not seek to *excuse* or *extenuate* the homicide; he *justifies* it; relying for his justification upon the legislation of Congress and the discharge of official duty. His act was done in execution or under color of law. "What cases, then, arise under the laws of the United States, within the meaning of this provision? Not those alone in which a plaintiff comes into court to demand something conferred upon him by law. When a defendant seeks protection under such a law, it is a case arising under it." (Hodgson *vs.* Millward, 3 Grant's Cases, 416, and 6 Phila. Reps., 246, per Strong, J., in the supreme court of Pennsylvania. See, to same effect, language of Grier, J., in the same case, in the United States circuit court, 3 Grant's Cases, 419; 6 Phila. Reps., 302.)

Of course the gravity of the charge can make no difference as to the right. If statutory process will authorize the removal of an indictment for assault (as in the case of Jenkins, 2 Wallace, jr., C. C. Reps.), it will one for murder. The *nature* of the question is the same in these two cases; the difference is only one of degree. The case of Wood *vs.* Matthews, reported in 2 Blatchf., 370, and 23 Vermont, 735, was trespass to recover $10 damages for the seizure of a horse by a customs-revenue officer. The existence of official relation and duty being established, and of a claim that the crime charged was in performance of that duty, affords the requisite ground for a removal of the cause. The truth and sufficiency of that justification must be determined at the hearing upon the merits. "It constitutes the very question to be tried and determined by the court when the case shall be heard before a jury." (Grier, J., in Hodgson *vs.* Millward, 3 Grant's Cases, 419, top, and 6 Phila. Rep., 302.) "Whether the horse in question was in truth seized and taken by the defendant in the exercise of his functions and performance of his duty as an officer of the customs under the revenue laws, as set forth in his petition for the removal of the cause, is a matter of fact belonging to and forming part of the merits of the case. It is involved in the inquiry whether the taking and detention were lawful and justifiable, and must be determined * * * on the trial of the merits in the usual course of proceeding." (Per Prentiss, J., in Wood *vs.* Matthews, 2 Blatch., 372, and 23 Vt., 735; Buttner *vs.* Miller, 1 Woods, 622, middle; Jones *vs.* The Oceanic Steam Navigation Co., 11 Blatch., 413, per Blatchford, J.)

The right thus to protect its officer and to hear accusations against him, is indispensable to the enforcement of

Federal laws. "What is the use of the power to lay the tax and to appoint the officer if he may not be protected? It is no answer to this to say that he may be protected when he does right, but not when he does wrong; for how can the United States know whether he has done right or wrong unless she can try him, and how can she try him unless he be delivered up on demand? It would seem to be too plain for discussion that the right to protect the officer is indispensable to the service and inseparable from the power of the government which appoints him. Nor is it an answer to say that the *State* will protect him if he deserves protection, for no one ever heard that one government could intrust the execution of its laws or the control of its officers to another government, however friendly. Governments could not remain friendly upon such relations." (State *vs.* Hoskins, 77 North Car., 534, top.) "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority." (Johnson, J., in Martin *vs.* Hunter, 1 Wheaton, 363.)

II.

AS TO THE MODE OF PROCEDURE.

"The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court," &c. (R. S., page 116, sec. 643, middle. See *ante*, . p. 4.)

The only construction to be given this language is that the case is to be prosecuted precisely as if the State had been authorized to initiate it in the circuit court.

The great objection made to this construction is, that it requires the State to pursue offenders against its peace and laws in the tribunal of another sovereign; but this is on account of the relation borne by the defendant to that other sovereign. The United States should protect and accord a just trial to its officers and agents; and it is more objectionable to require the sovereign whose laws are supreme to go into the courts of a sovereign whose laws are not supreme (in case of conflict) to defend his laws and his officers, than to have the question determined in the courts of the superior sovereign.

If the provision for procedure be inadequate, that is a mishap to be remedied by legislation; it does not render unconstitutional that portion of the statute which clearly and expressly authorizes the removal.

III.

If the position above assumed be correct, it answers affirmatively the question as to whether or not a trial of the accused can be had in the court to which the cause has been removed.

As there intimated, the anomaly, if any there be, arises out of the peculiar character of our institutions which demand of a citizen duties toward two sovereigns.

If accused by the State for an act which his obligation toward the United States compelled him to perform, or in doing which it justified him, then it is for the sovereign whose laws are supreme to vindicate that

supremacy by requiring that the truth of the accusation and the invalidity of the defense be ascertained in his own tribunals.

Every citizen sustains a dual relation toward the sovereignty of the State and of the nation. An act is done which may be an offense against the former, *unless performed in the discharge of some duty owed to the latter.* It is such an act, for instance, as gives occasion for the present discussion. First, take the conceded fact that one citizen of Tennessee has killed another. This bold statement would seem to indicate a matter to be investigated by the courts of that State. Suppose it be added that the man killed had been capitally condemned by regular proceedings in the United States circuit court for Tennessee for an offense against Federal law, and that his execution under due process of law, by the proper functionary, was the killing complained of, it would then be evident that the State court would have no right to interfere. But if, as in the cause at bar, the deceased came to his death at the hands of one who was a Federal officer, who professed in the killing to be acting in the discharge of official duty; then it appears that what is charged as an offense against the State will be so or not, as the respondent was or was not protected in his action by Federal laws. It can make no difference whether those laws *explicitly required* such action of him, or merely justified it upon such a contingency as arose. Who is to determine whether or not the accused is thus protected? Obviously this question should be committed to the tribunals of that sovereignty whose supreme laws are invoked as a defense. The validity or construction of Federal law is drawn in question and should be decided in the Federal court. (23 Vt., 735, cited sup.)

But, as before observed, if, under existing laws, there could be no jury trial in the Federal court, it would by no means follow that the cause could not be removed. It would still be removable, and it would be for Congress to remedy the defect.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

TENNESSEE
vs.
JAMES M. DAVIS. } No. 720.

DIVISION OF OPINION IN UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

DEFENDANT'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

TENNESSEE
v.
JAMES M. DAVIS. } No. 720.

DIVISION OF OPINION IN UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

DEFENDANT'S BRIEF.

STATEMENT.

At a session of the United States circuit court for the middle district of Tennessee the circuit and district judges differed in opinion upon these three questions, viz:

1st. "Is an indictment of a revenue officer found in a State court for murder, under the facts alleged in the petition for removal in this case, removable to this court under section 643 of the Revised Statutes of the United States?"

Omitting caption and verification, the petition was as follows:

"Your petitioner, James M. Davis, would most respectfully show to the court that on the 21st day of May, 1878,

at the May term of the circuit court of Grundy County, Tennessee, the grand jurors of the State of Tennessee, at the instance of E. M. Haynes, as prosecutor, indicted your petitioner for willfully, premeditatedly, deliberately, and of his malice aforethought, killing one J. B. Haynes, which indictment and criminal prosecution so instituted is still pending against your petitioner in the circuit court of Grundy County, within the middle district of Tennessee.

"And he further shows that no murder was committed; but, on the other hand, the killing was committed in his own necessary self-defense, to save his own life; that at the time the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy collector of internal revenue; and he was acting by and under the authority of the internal-revenue laws of the United States, and was done under and by right of his office, to wit, as deputy collector of internal revenue. It is his duty to seize illicit distilleries, and the apparatus that is being used for the illicit and unlawful distillation of spirits, and while so attempting to enforce the revenue laws of the United States as deputy collector aforesaid, he was assaulted and fired upon by a number of armed men, and in defense of his life returned the fire.

"In view of these facts your petitioner prays that said cause may be removed from the circuit court of Grundy County to the circuit court of the United States for the middle district of Tennessee for trial, and that a *certiorari* issue. And as in duty bound he will ever pray." (Record, 1, 2.)

2d. If removable from the State court, is there any mode and manner of procedure in the trial prescribed by act of Congress? (Record, 2, folio 5.)

3d. And if not, can a trial of the guilt or innocence of the defendant be had here? (*Ib.*)

R. S., secs. 641 and 642, are as follows:

"SEC. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or

complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed.

"SEC. 642. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."

The section of the R. S. specially applicable to the present case is this:

"SEC. 643. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account

of any act done under the provisions of Title XXVI, 'The elective franchise,' or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session; or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process, except capias, the clerk of the circuit court shall issue a writ of certiorari to the State court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or by some person duly authorized thereto. And thereupon it shall be the duty of the State court to stay all further proceedings in the cause; and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall

be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody or [*on*] mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court; or, in vacation, of any judge thereof, and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."

See act of July 13, 1866, c. 184, § 67 (14 Stats., 171), and act of March 2, 1833, § 3 (4 Stats., 633).

Also see the preceding sections 641 and 642 of the R. S.

Thus, it is seen that section 641 provides for the removal into the United States circuit court of civil or *criminal* prosecutions against any person who is denied or cannot enforce in the judicial tribunals of the State, &c., any right secured to him in any law providing for the equal rights of all citizens and of all persons.

Section 642 provides the form of removal of the cause and for the issue of the writ of *habeas corpus* to bring the person of the prisoner and the process by which he is held to the Federal court for cognizance thereof; while section 643 relates to the removal of civil causes or *criminal* prosecutions against those acting under the revenue and registration laws of the United States.

BRIEF.

The main question here to be discussed is substantially the same as that which has, for over half a century, been debated in Congress and before the country, viz, whether the United States Constitution is a frame of government created by the people, and acting directly from and upon the individual, or is merely a compact or league of sovereign States. At any rate, if not directly involved, a satisfactory answer to that inquiry aids greatly in arriving at a correct conclusion upon the interrogatories propounded. If the United States Government, made supreme within its sphere of operation, emanates directly from the people, we should more naturally expect to find the investigation of the conduct of its officers, whenever brought in question, committed to the federal tribunals than we should if this delegation of authority was a limitation of sovereignty voluntarily imposed by the States themselves. If the right of removal were expressly conferred, it would be immaterial whether the instrument giving it were the creation of the people or of the States; but as it is not thus explicitly bestowed (Martin *v.* Hunter, 1 Wheaton, 349), the origin of the Constitution authorizes as the proper construction the one which circumscribes the power of the State with reference to one acting under color of a federal office.

I.

Those who, following Mr. Calhoun, insist that the general government is *purely* federal (and not national) in

its character are logically compelled to deny the right to remove *any* cause from the State to the federal court, and to declare the judiciary act of 1789, § 20, unconstitutional; because if any right of removal exists it must extend alike to criminal and civil cases, and the extent to which, as well as the time and manner in which it shall be exercised (whenever federal laws or their execution is concerned), is a question of expediency and not of power.

This argument is thus stated by Mr. Calhoun in his essay "On the Constitution and Government of the United States":

"It is true, as has been alleged, that the provisions of the section [act of September 24, 1789, § 25] are restricted; that they are limited to civil cases, and to appeals from the highest State courts to the Supreme Court of the United States. Thus restricted, they would not be sufficient to subject the reserved powers completely to the delegated, and to lead, at least, speedily, to all the consequences stated. But what assurance can there be that the right, if admitted, will not be carried much further? The right of appeal itself can only be maintained, as has been shown, on the assumption that the courts of the States stand in the relation of inferior courts to the Supreme Court of the United States. Resting on this broad assumption, no definite limits can be assigned to the right, if it exists at all. *It may be extended to* CRIMINAL *as well as civil cases; to the circuit courts of the United States as well as to the Supreme Court;* to the transfer of a case, civil or criminal, at *any* stage, before as well as after final decision, from the State courts to *either* the circuit court or the Supreme Court of the United States, to the exemption of all the employés and officers of the United States when acting under the color of their authority from civil and criminal proceedings in the courts of the States, and subjecting those of the States acting under their respective laws to

the civil and criminal process of the United States; to authorize the judges of the United States court to grant writs of *habeas corpus* to persons confined under the authority of the States, on the allegation that the acts for which they were confined were done under color of the authority of the United States; and, finally, to authorize the President to use the entire force of the Union—the militia, the Army and Navy—to enforce, in all such cases, the claim of power on the part of the United States. If the courts of the States be, indeed, inferior courts, if an appeal from them to the Supreme Court of the United States can be rightfully authorized by Congress, all this may be done. May! It has already been done. All that has been stated as possible is but a transcript of the provisions of the act approved 3d March, 1833, entitled "An act to provide for the collection of duties on imports," as far as it relates to the matter in question." (1 Calhoun's Works, 330, 331.)

II.

In this forum, at least, it is settled that the United States are a nation, not a league; and that the Constitution emanated from the people and not from the States. (McCulloch *v.* Maryland, 4 Wheaton, 402 to 406; Martin *v.* Hunter, 1 Wheaton, 332.)

The Judiciary Act of September 24, 1789—passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument and in securing its adoption—and which has ever since remained upon the statute-book, and been constantly acted upon, must also be deemed so established that its constitutionality cannot even be discussed. (Martin *v.* Hunter, 1 Wheaton, 304; Cohens *v.* Virginia, 6 Wheaton, 264.)

The convention which framed the Federal Constitution considered fully the necessity not only of constitu-

ting tribunals which should decide on all cases involving the construction of the Constitution of the United States and the legislation thereunder, but to which should be removed cases in which such questions arose.

See Luther Martin's Genuine Information to Maryland Legislature, in which he says: "It was urged that there was no occasion for inferior courts of the general government to be appointed in the different States, and that such ought not to be admitted—that the different State judiciaries in the respective States would be competent to and sufficient for the cognizance in the first instances of all cases that should arise under the laws of the general government, which, being by this system made the supreme law of the States, would be binding on the different State judiciaries—that by giving an appeal to the Supreme Court of the United States, the general government would have a sufficient check over their decisions, and security for the enforcing of their laws." As a further objection it was urged, "that the judiciaries of the respective States not having power to decide upon the laws of the general government, but the determination of those laws being confined to the judiciaries appointed under the authority of Congress in the first instance, as well as on appeal," there would be created an immense number of Federal offices in each State. Thus it appears that the creation of Federal "tribunals inferior to the Supreme Court" was opposed in the convention, because it would deprive "the judiciaries of the respective States" "of the power to decide upon the laws of the general government," and would "confine" the determination of those laws "to the judiciaries appointed under the authority of Congress in the first instance, as well as on appeal."

These objections, however, failed to influence the convention, but those who urged them "were overruled," says Luther Martin, "by a majority, who assuming it as a principle that the general government and the State governments (as long as they should exist) would be at perpetual variance and enmity, and that their interests would constantly be opposed to each other, insisted, for that reason, that the State judges being citizens of their respective States and holding their commissions under them, ought not, though acting on oath, to be intrusted in the administration of the laws of the general government."

The judiciary act of 1789 being constitutional, Mr. Calhoun is correct in his logical inference that the subsequent legislation now under consideration is also constitutional.

The judiciary act of 1789 authorized the removal of civil cases *before trial*, and the re-examination of certain cases *after judgment* in the State courts. In 1815 (act of February 4, 1815, § 8, 3 Stats., 198), provision was made for the removal, *before trial*, of suits, civil and criminal, brought against revenue officers, excepting only those cases in which corporal punishment might be inflicted. This was a war measure. It was continued in force five or six years by the acts of 1816 and 1817.

In 1833, when the enforcement of the revenue laws again became difficult and dangerous, a similar statute was passed, which has been in force ever since, made to apply by the act of 1866 to internal-revenue officers, and now incorporated in the Revised Statutes, sec. 643.

The law approved March 2, 1833, § 3, was passed by a vote of 32 to 1 (John Tyler) in the Senate, and 126 to 34 in the House, in compliance with the recommenda-

tions of a special message of President Jackson sent to Congress January 16, 1833, in view of the then existing emergency, arising out of the threatening position of South Carolina with reference to the tariff laws. So far as the provisions of law affecting the present case are concerned, the third section of this act of March 2, 1833, is substantially the same as the act of July 13, 1866, § 67, and R. S., sec. 643, the only important difference being that the word "criminal" now precedes "prosecution." The same principle was involved, and the same practice, as to cases not involving corporal punishment, in the act of February 4, 1815, § 8; and, as we say, and as Mr. Calhoun said, the same principle was also involved in the judiciary act of September 24, 1789, § 25.

In the concluding chapter (XII) of the first volume of Dr. Von Holst's very able work, "The Constitutional and Political History of the United States," will be found an interesting *résumé* of the Congressional debates in 1832–'33, and of the adoption of Clay's compromise measure, reducing the tariff, whereby South Carolina was induced to repeal its ordinance of nullification. That author says (page 501, Am. ed., A. D. 1877), "It matters not how great the concessions of the Federal Government were. The latter had not given up the principle; the force bill was an indirect declaration that it held fast to that;" and he concludes the volume with a quotation of Bismarck's language: "Sovereignty can only be a unit, and it must remain a unit—the sovereignty of law."

The application we understand him to make of this observation is, in effect, that the law-making power must necessarily have authority to enforce its enactments and

to protect those designated to execute it. A law can only be enforced through judicial and executive officers, and if these be not protected in its execution the law is not sovereign.

Practically, a law is just as much nullified if those intrusted with its enforcement can be called in question in State tribunals for their discharge of official duty, as it is by any direct ordinance and avowed opposition. If the supreme court of the State may claim the right, so may every justice of the peace.

We have observed that the judiciary act of 1789 authorized the removal of civil cases before trial as well as the re-examination of certain cases after judgment in the State courts.

But, as before remarked, if a case may be removed at all, the time when it shall be removed from the State court to the United States court is a question of convenience and expediency only. If removable after a deliberate judgment has been rendered *a fortiori*, ought it to be so before any conclusion has been reached? It is much more derogatory to the dignity of the State and of its judiciary to set at naught the final conclusion of the State court upon the whole merits of a cause, after a full hearing upon the law and facts, than to deprive it at the outset of cognizance of a case found to possess a federal ingredient.

Appearing for the defendant in error, in Martin *v.* Hunter, Messrs. Tucker and Dexter argued that the power of removal could be exercised "at any time *before* final judgment, though not *after* final judgment." (1 Wheaton, 346, near bottom, where Judge Story refutes this argument.)

So far as the right of a State to determine upon the propriety or legality of the conduct of its citizens and residents is concerned, this attribute of sovereignty is circumscribed as well by the enforced removal of a *civil* cause as of a criminal prosecution. It is the ordinary incident of sovereign power to determine upon all *property* rights arising and litigated within the territorial limits of the State, as much as to inquire into personal injuries, or to punish violations of its statutes, and this irrespective of the domicile of either litigant; presence of the person or thing ordinarily giving to the courts of the local sovereign authority to adjudicate all questions proper for judicial decision relating to the individual or property so found in his domain. The difference between the removal of a civil action and of a criminal prosecution is one involving an inquiry as to the *extent* of the constitutional grant of jurisdiction and not as to its *nature*. In principle there is no distinction; but, from long and frequent usage to transfer civil causes, this divestiture of State authority excites little animadversion. These, it is true, are ordinarily between private litigants, but those to which corporations created by the State are party are frequently removed; and the Constitution expressly confers jurisdiction over controversies in which a State is engaged with a citizen of another State, and over those in which citizens of different States are concerned, claiming lands which are part of the State's domain, and to which one party sets up a title derived from the State.

The sovereignty of the State is affected just the same, whether the cause be taken to the circuit court or necessarily brought originally in this court. In either case it stands before the bar of a sovereignty authorized to

command the State as to the thing to be done in that particular instance. The appellate jurisdiction of the United States may be exercised through such tribunals as it sees fit to ordain and establish.

Possibly the objection may be made that the removal takes the whole case—as to its *facts* as well as the law—out of the cognizance of the State tribunal; and that, although the statute might be constitutional if it merely permitted a final revision of the *law* in this court, after final judgment in the State court, it is unconstitutional to remove the cause for hearing upon the facts. The right of removal exists by reason of the appellate power vested in the courts of the United States; and this exists as to questions of fact as well as of law. Article III, section 2, second paragraph, of the Constitution of the United States gives this court jurisdiction over the law and facts. As to cases like the present, it says: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Power to hear and determine the *facts* of any case which can in any way be brought before a Federal tribunal may be lodged by Congress in such courts as it may prescribe. Practically, no appellate jurisdiction can be exercised over the facts of a case, unless those facts have been passed upon by the tribunal from which the appeal is taken; and the subordinate Federal courts can only pass upon the facts in transferred cases if the transfer is made before trial. In patent and admiralty causes, strictly Federal in their character, this court does review the facts; though in civil cases, generally, facts once found

by a jury can only be reviewed in accordance with the course of the common law. According to that course, this court and the inferior United States courts are capable of receiving from Congress authority to review every question of law or fact that may arise in a cause of which they have cognizance. Not that if a question of fact has once been examined in a State court it is necessarily to be re-examined, but that if it be a case where examination of the fact is important in the courts of the United States, it can there be made, originally or upon review. This, however, was authorized as to civil cases in the judiciary act of 1789, and has been ever since; and in 1815 in both civil and criminal causes, as hereinbefore mentioned. No reason why the facts in the criminal prosecution should not be determined in the United States court suggests itself that is not also applicable to civil actions. Indeed, for the due execution of the laws, it may be more necessary to remove issues of fact in criminal cases against an executive officer, in which the jury have so large a power, than mere civil suits. It is a proper interference, so that his own government may determine whether or not such officer has simply performed his duty or has exceeded it. It is the prerogative of sovereignty to ascertain whether or not its officials are faithful or culpable; and any offended sovereign must complain to the sovereign of any officer whose offense is claimed to be done in compliance with the directions or laws of his sovereign. Mr. Forsyth, in debate upon the bill of 1833, thought it might be *expedient* to amend the provision so as to only allow removal *after* judgment in criminal cases, but Mr. Webster objected, thinking this "the most important provision in the bill as respects the protection of the Fed-

eral officers," and the amendment was rejected by a vote of 28 to 5. The method of effecting the removal was suggested by Mr. Ewing, of Ohio, and corresponds with that provided in the act of 1815.

The right of a State to vindicate and preserve its peace is subject to the graver rights of the United States to preserve and vindicate their powers; one of such powers being to pronounce by their own legislature, or at least by their own judiciary, what these powers are. (Mayor *vs.* Cooper, 6 Wall., 253.) It is a presumption *juris et de jure*, that no statute of the United States, held valid by the courts of the United States, *can* disturb the peace of a State.

If contemporaneous exposition of an instrument is of any value, Congressional action, continued from the earliest to the present day, should settle the constitutionality of the provisions of R. S., sec. 643.

We have before observed that the act of 1789 was passed by those who aided in framing and adopting the Constitution.

It was approved by George Washington, who presided over the Constitutional Convention, and was passed with Jefferson in the chair of the Senate.

The act of March 4, 1815, § 8, was approved by James Madison and voted for by John C. Calhoun.

The same President approved the continuance of this legislation by acts of April 27, 1816, and of March 3, 1817.

The act of 1833 was an administration measure, proposed by President Jackson, as already noticed, and

supported by his adherents as well as by Webster, Clay, and others who did not, in other matters, agree with those who had elected General Jackson. John Tyler, who voted alone against it, based his objections wholly upon the *inexpediency* of the act, and not upon its unconstitutionality. He objected that it allowed one indicted in the State court for murder to be tried in the United States circuit court. (9 Cong. Deb., 373.)

The acts of 1863, 1864, 1866, 1871, 1873, and R. S., sections 641 to 643, will not be separately mentioned, because it will be contended that they all belong to this class of legislation, which must stand or fall together. It is enough to say that they are identical in principle with the earlier statutes, as is declared by this court in Mayor *v.* Cooper (6 Wall., 253, 254), hereinafter quoted.

These statutes are constitutional. (Martin *vs.* Hunter, 1 Wheaton, 335; Cohens *vs.* Virginia, 6 Wheaton, 264; Mayor *vs.* Cooper, 6 Wallace, 247; Hodgson *vs.* Milward, 3 Grant's Cases, 416 and 418; State *vs.* Hoskins, 77 No. Car., 530; Venable *vs.* Richards, 22 Int. Rev. Rec., 299; Tod *vs.* Fairfield Com. Pl., 15 Ohio St., 387–8, and the other cases hereinafter cited.)

Not only have these laws been thus declared constitutional, but it has been repeatedly held that it is entirely immaterial whether they direct or permit the removal to be made before or after judgment, or in criminal as well as civil cases.

We have alluded to the position *arguendo* of those eminent lawyers, Tucker and Dexter, in Martin *v.* Hunter, that the removal must be before judgment, and not after. In delivering the opinion of the court in that

case, Judge Story—after stating this position of counsel, and observing that "It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people by whom it was adopted; so that this court can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them"; and noticing that "The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice"—proceeds to say:

"This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not [*sic*], in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error, is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature

of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments; and if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them.

"Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

"The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution if it could act only on the parties and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and, in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the State decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

"On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the State courts; and that the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Consti-

tution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to create one.

"Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion.

"This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority, which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts." (Martin *v.* Hunter, 1 Wheaton, 349–352.)

The above was a civil cause. The next one we have cited (Cohens *v.* Virginia, 6 Wheaton, 264 to 430) was an indictment found against the Cohens, in the highest criminal court of Virginia, for vending lottery tickets,

contrary to the statutes of that State. In delivering the opinion of the court, Marshall, C. J., said:

"One of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. The mere circumstance that a State is a party gives jurisdiction to the court. How, then, can it be contended that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the Constitution or laws of the United States are supposed to have been violated? The Constitution gave to every person having a claim upon a State a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our Constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined that the same persons considered a case involving the Constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a State is a party?

* * * * *

"The mischievous consequences of the construction contended for on the part of Virginia are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the

will of one of its members. Each member will possess a veto on the will of the whole.

* * * * *

"States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature. The Constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that Constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of Congress may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final!

"These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own

courts rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating in the form of law the legitimate measures of the Union." (6 Wheaton, 383–384, 385, and 386–388.)

In the case of Mayor *v.* Cooper (6 Wallace, 247), those sections of the acts of 1863 and of 1866, relating to removal of causes, were considered and their validity affirmed. In giving the opinion of the court, Swayne, J., after referring to the clause of the Constitution relating to the judicial power, observes:

"The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it had been acquired, are not prescribed. The Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature. * * *

"Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary-line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. *There is no distinction in this respect between civil and criminal causes.* Both are within its scope. Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the question of jurisdiction." (6 Wallace, 251, 252.)

Upon the next page the learned judge proceeds to remark that "it is the right and duty of the national government to have its own Constitution and laws interpreted and applied by its own judicial tribunals," whose decisions are as conclusive as statutory enactments; that—

"This is essential to the peace of the nation and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. * * * *For every act of an officer, civil or military, of the United States, including alike the highest and the lowest, done under their authority, he would be liable to harassing litigation in the State courts. However regular his conduct, neither the Constitution nor laws of the United States could avail him, if the views of those tribunals and of the juries which sit in them should be adverse. The authority which he had served and obeyed would be impotent to protect him. Such a government would be one of pitiable weakness, and would wholly fail to meet the ends which the framers of the Constitution had in view.* They designed to make a government, not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of this court have uniformly held that it is so." (6 Wall., 253.)

The opinion then continues and concludes thus:

"The jurisdiction here in question involves the same principle and rests upon the same foundation with that conferred by the twenty-fifth section of the judiciary act of 1789. The constitutionality of that provision has been uniformly sustained by the unanimous judgment of this court whenever the subject has been presented for adjudication.

"The twelfth section of the act of 1789 and the third section of the act of the 2d March, 1833, relating to revenue officers, present the same question. We are not aware that a doubt as to the validity of either has ever

been expressed by any Federal court. The acquiescence is now universal.

"The fourth and fifth sections of the act of 1863 are copied largely from the eighth section of the act of February 4, 1815. That act expired by its own limitation at the close of the then existing war. The section referred to was continued in force for one year in the sixth section of the act of March 3, 1815. See also the third section of the act of March 3, 1817.

"We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen.

"The validity of the defense authorized to be made is a distinct subject. It involves wholly different inquiries. We have not had occasion to consider it. It has no connection whatever with the question of jurisdiction." (6 Wallace, 253–4.)

This case is brought, by the facts stated in the petition, within the terms of this legislation. (See petition, Record, 1, 2, and ante, 2. Kulp *vs.* Picketts, 3 Grant's Cases, 420.)

The idea has been suggested that the indictment which can be removed, under R. S., sec. 643, from the State to the Federal court must be for some act made an offense against the United States by some other provision of the Revised Statutes. (See Plf.'s Brief, p. 1, § 1, and p. 4, *et seq.*) This position is untenable, since no State would undertake to prosecute in its own courts for offenses which only contravened Federal law. The criminal suit subject to removal must, therefore, be one which, on the face of the process, professes to charge the accused with a violation of the laws of the State; and the basis of the removal must be some relation (made to appear upon oath) borne by the act complained of, or

by the actor, to the Federal Government and laws. Proof of such relation authorizes the removal. (Hodgson *vs.* Millward, 3 Grant's Cases, 416, 418, and 419; Ex p. Robinson, 6 McLean, 355; Ex p. Jenkins, 2 Wall., jr., C. C., 521, per Grier, J.; same case, *Ib.*, 539; U. S. ex. rel. Garland *vs.* Morris, 2 Am. L. Reg., 348; Ex p. Roberts, 2 Abbott's U. S. C. C. Rep., 265.)

The proposition that the defendant has committed an offense against the State assumes the existence of the very fact at issue in the cause, namely, the guilt of the accused. (Plf.'s Brief, p. 1, § 2.) It is said to be unconstitutional to attempt to give to the Federal courts jurisdiction of crimes which are offenses against the State *alone*. But both the State and Federal law presume the accused to be *innocent* of *any* offense. The theory is that he is wrongfully, or mistakenly, accused until the proof fully satisfies a jury, upon legal evidence, of his guilt. Assume it to be argued that it is unconstitutional to remove any accusation where the crime, if any, is only against the State; still, as it is alleged in defense that the act complained of was one required in the faithful performance of an official duty owed to the United States, it is seen that this furnishes the Federal ingredient which gives jurisdiction, and that the United States is equally interested with the State in a correct determination of the questions involved.

The distinction made by Ballard, J., in United States *vs.* Roberts (2 Abb. C. C., 279), is a just one. The defendant does not seek to *excuse* or *extenuate* the homicide; he *justifies* it; relying for his justification upon the legislation of Congress and the discharge of official duty. His act was done in execution or under color of law.

"What cases, then, arise under the laws of the United States, within the meaning of this provision? Not those alone in which a plaintiff comes into court to demand something conferred upon him by law. When a defendant seeks protection under such a law, it is a case arising under it." (Hodgson *vs.* Millward, 3 Grant's Cases, 416, and 6 Phila. Reps., 246, per Strong, J., in the supreme court of Pennsylvania. See, to same effect, language of Grier, J., in the same case, in the United States circuit court, 3 Grant's Cases, 419; 6 Phila. Reps., 302.)

It is not intended to admit, however, that the defendant might not have the right to have his cause removed to the Federal tribunal, if he claimed to have been acting officially, and such official character tended to so far color his act as to extenuate what it did not fully justify in his conduct. It is enough that, in the present case, Mr. Davis sets up the discharge of official duty as a full justification of his act.

Of course the gravity of the charge can make no difference as to the right. If statutory process will authorize the removal of an indictment for assault (as in the case of Jenkins, 2 Wallace, jr., C. C. Reps.), it will one for murder. The *nature* of the question is the same in these two cases; the difference is only one of degree. The case of Wood *vs.* Matthews, reported in 2 Blatchf., 370, and 23 Vermont, 735, was trespass to recover $10 damages for the seizure of a horse by a customs-revenue officer. The existence of official relation and duty being established, and of a claim that the crime charged was in performance of that duty, affords the requisite ground for a removal of the cause. The truth and sufficiency of that justification must be determined at the hearing upon

the merits. "It constitutes the very question to be tried and determined by the court when the case shall be heard before a jury." (Grier, J., in Hodgson *vs.* Millward, 3 Grant's Cases, 419, top, and 6 Phila. Rep., 302.) "Whether the horse in question was in truth seized and taken by the defendant in the exercise of his functions and performance of his duty as an officer of the customs under the revenue laws, as set forth in his petition for the removal of the cause, is a matter of fact belonging to and forming part of the merits of the case. It is involved in the inquiry whether the taking and detention were lawful and justifiable, and must be determined * * * on the trial of the merits in the usual course of proceeding." (Per Prentiss, J., in Wood *vs.* Matthews, 2 Blatch., 372, and 23 Vt., 735; Buttner *vs.* Miller, 1 Woods, 622, middle; Jones *vs.* The Oceanic Steam Navigation Co., 11 Blatch., 413, per Blatchford, J.; Dennistoun *vs.* Draper, 5 Blatch., 336, per Nelson, J.)

The right thus to protect its officer and to hear accusations against him is indispensable to the enforcement of Federal laws. "What is the use of the power to lay the tax and to appoint the officer if he may not be protected? It is no answer to this to say that he may be protected when he does right, but not when he does wrong; for how can the United States know whether he has done right or wrong unless she can try him, and how can she try him unless he be delivered up on demand? It would seem to be too plain for discussion that the right to protect the officer is indispensable to the service and inseparable from the power of the government which appoints him. Nor is it an answer to say that the *State* will protect him if he deserves protection, for no one ever heard that one government could

intrust the execution of its laws or the control of its officers to another government, however friendly. Governments could not remain friendly upon such relations." (State *vs.* Hoskins, 77 North Car., 534, top.) "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. (Johnson, J., in Martin *vs.* Hunter, 1 Wheaton, 363.)

II.

AS TO THE MODE OF PROCEDURE.

Assuming the constitutionality of the act (R. S., § 643) providing for the transfer of civil and criminal cases to be fully established, and that the facts stated in the petition bring this cause within the provisions of that section, we are brought to consider the second question propounded to you by the circuit court:

2d. If removable from the State court, is there any mode and manner of procedure in the trial prescribed by act of Congress? (Record, 2, folio 5.)

Doubt might be suggested as to this question being such an one as was contemplated by the statute (R. S., § 697) authorizing the certification of a question occurring upon the trial or hearing of a criminal proceeding. It is rather one seeking advice as to what the procedure is to be, in case a trial or hearing is hereafter determined upon and had. But if this court is prepared to render merely advisory opinions to guide the conduct of other Federal courts, we are prepared to show

that there is a method of procedure explicitly provided by Congress in cases like the present.

"The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court." (R. S., page 116, § 643, middle. See *ante*, p. .)

The construction which we think should be given this language is that the case is to be prosecuted precisely as if the State had been authorized to initiate it in the circuit court. (Com. *vs.* Artman, 3 Grant's Cases, 437, per Grier, J.)

The great objection made to this construction is that it requires the State to pursue offenders against its peace and laws in the tribunal of another sovereign; but this is on account of the relation borne by the defendant to that other sovereign. The United States should protect and accord a just trial to officers and its agents; and it is more objectionable to require the sovereign whose laws are supreme to go into the courts of a sovereign whose laws are not supreme (in case of conflict) to defend his laws and his officers, than to have the question determined in the courts of the superior sovereign. (Ohio *vs.* Bliss, 3 Grant's Cases, 429, near bottom.)

Another section (722) of the Revised Statutes points out the precise method of trying causes which have been brought into the Federal courts under sec. 643 and kindred provisions of law. It is this:

SEC. 722. The jurisdiction in civil and *criminal* matters conferred on the district and circuit courts by the provisions of *this* Title [xiii—"Judiciary," in which sec. 643 is found], and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication,

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S., sec. 722.)

If the position above assumed be correct, it answers affirmatively the question as to whether or not a trial of the accused can be had in the court to which the cause has been removed.

As there intimated, the anomaly, if any there be, arises out of the peculiar character of our institutions which demand of a citizen duties toward two sovereigns.

If accused by the State for an act which his obligation toward the United States compelled him to perform, or in doing which it justified him, then it is for the sovereign whose laws are supreme to vindicate that supremacy by requiring that the truth of the accusation and the invalidity of the defense be ascertained in his own tribunal.

Every citizen sustains a dual relation toward the sovereignty of the State and the nation. An act is done which may be an offense against the former, *unless performed in the discharge of some duty owed to the latter.* It is such an act, for instance, as gives occasion for the present discussion. First, take the conceded fact that one citizen of Tennessee has killed another. This bald

statement would seem to indicate a matter to be investigated by the courts of that State. Suppose it be added that the man killed had been capitally condemned by regular proceedings in the United States circuit court for Tennessee for an offense against Federal law, and that his execution under due process of law, by the proper functionary, was the killing complained of;—it would then be evident that the State court would have no right to interfere. But if, as in the cause at bar, the deceased came to his death at the hands of one who was a Federal officer, who professed in the killing to be acting in the discharge of official duty; then it appears that what is charged as an offense against the State will be so or not, as the respondent was or was not protected in his action by Federal laws. It can make no difference whether those laws *explicitly required* such action of him, or merely justified it upon such a contingency as arose. Who is to determine whether or not the accused is thus protected? Obviously this question should be committed to the tribunals of that sovereignty whose supreme laws are invoked as a defense. The validity or construction of Federal law is drawn in question and should be decided in the Federal court. (23 Vt., 735, cited sup.)

If, however, under existing laws, there could be no jury trial in the Federal court, it would by no means follow that the cause could not be removed. It would still be removable, and it would be for Congress to remedy the defect.

III.

The third question upon which the judges below divided is, if no method of procedure is provided by Con-

gress, "Can a trial of the guilt or innocence of the defendant be had here?"

This question, like its predecessor, is prospective, and did not arise upon the hearing or trial of a criminal case, under R. S., sec. 697. If it were possible to conclude that R. S., sec. 722, does not provide a mode of trying this cause, yet the provision for its transfer and trial in the circuit court would seem to imply that all those incidents and forms attached to the trial of a capital cause in the State where the court is held should be observed in ascertaining, by means of such trial, the innocence or guilt of the accused.

IV.

Though we understand the statutes to authorize a full trial in the Federal court, yet if this be not so, there may be no difficulty in having the circuit court direct a trial of the facts alleged in the petition, to ascertain whether or not the defendant was justified in doing those things alleged to constitute the crime. The inquiry might be whether or not, in so acting, he was in the discharge of official duty and therefore justified; if not, he might be sent back to be dealt with in the State court. This would be analogous to trying the question of the present sanity of a prisoner. Is he *now* in a status to be held amenable to the law of the State? Is he *now* sane? Does he *now* stand excused for the acts done by reason of the duty owed to the Federal Government? But the R. S., sec. 722, contemplates that the United States court shall decree the punishment, in conformity to the law of the State.

Again: If the trial proceed to a verdict, and that be against the accused, there is no reason why the prisoner

might not be then remanded to the State court for sentence upon the conviction thus obtained, except as R. S., sec. 722, requires sentence to be passed in the Federal court. If so remanded, the criminal would have been convicted in the tribunal to which he chose to resort, and the State, whose laws had been violated, would have the opportunity to impose the penalty its officers might think proportioned to the offense. If imposed under R. S., sec. 722, it is to be such as the State law affixes to the crime.

The seventh section of the act of 1833, now embodied in R. S., sec. 753, authorized the issue of habeas corpus by the judge of a Federal court to procure the release of one held in custody (under sentence it might be) for an act done in obedience to Federal law. Judges Grier, Ballard, and others exercised this power in the instances before mentioned. It is certainly no more of an infringement upon the supposed dignity of a State to have this done after trial by a jury which, though sitting in a Federal tribunal, is composed of citizens of the State where the charge is made.

Reference to this section (753) leads us to say that, even if the Revised Statutes point out no practicable method for obtaining a jury trial of this cause, it by no means necessarily follows that it must be remanded to the State court. The prisoner and the record of the indictment upon which he is held in custody are brought by habeas corpus before the circuit court. If not put upon his trial under sec. 643, the cause of commitment should be inquired into under sec. 753, and the prisoner then returned into the custody of the State sheriff or discharged, according as that inquiry might show him

to be culpable or justified in the commission of the acts which are alleged against him in the indictment.

The answer to the third question, then, should either be that a jury trial may be had under sec. 643, to be conducted according to State law (so far as that does not conflict with those of the United States) under sec. 722; or else that an examination into the truth of the justification alleged should be had under sec. 753. This course was the one pursued by Grier, Ballard, J. J., and others in the cases hereinbefore cited.

Though the questions now presented did not necessarily arise in the case of Com. *vs.* Casey, 12 Allen, 214, they were somewhat considered by Gray, J., in delivering the opinion. The act before the court in that case was the act 1833, sec. 3, which does not contain the word "criminal." That learned judge deems the act of Congress not to authorize the transfer of criminal cases. But Mayor *vs.* Cooper, decided nearly two years after Com. *vs.* Casey, under the action of Congress in inserting the word "criminal" before "prosecution," thus giving a legislative construction of the previous laws, holds that the present law at least applies to criminal. It is submitted, too, that this eminent jurist mistakes the meaning of Judge Story's language in Martin *vs.* Hunter, 1 Wheaton, 350, cited by Judge Gray in 12 Allen, 221, as a recognition of "the difficulty of removing a criminal case from the State courts into the national courts before trial and judgment in the courts of the State." Judge Story says: "The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties and not upon the State courts. In regard to criminal prosecutions the difficulty seems to be insurmountable," &c. (1 Wheaton, 350.) Thus, his meaning would appear to be that if the removal could only be made

effective by injunction or stay operating upon the *parties*, the difficulty would be insurmountable in criminal prosecutions conducted by the State and its officers; whereas, if, as he held, the removal operated upon the *courts*, no such difficulties would arise, even in this class of cases. So far, then, from perceiving any difficulty in the transfer of a criminal case, Judge Story saw none upon his construction of the law, adopted by this court; but that it would arise if the one contended for by the plaintiffs was accepted. This sufficiently appears from the language quoted and from the context.

Immediately after this reference to the opinion of Judge Story, Mr. Justice Gray proceeds to say: "The construction that the third section of the act of 1833 does not apply to criminal cases is strongly confirmed by the seventh section, which gives an immediate and effectual remedy to any person imprisoned on a criminal charge or sentence," by authorizing the Federal judiciary to issue a writ of habeas corpus in all cases of prisoners confined for any act done or omitted in pursuance of a law of the United States, &c.; the provisions of this section being now incorporated in R. S., sec. 753.

Thus the propriety and necessity of an appeal to the Federal courts by Federal officers imprisoned for acts done by them under color of office is everywhere recognized; and if this defendant cannot be regularly tried in the circuit court, the truth or falsity of the facts alleged in his petition should be ascertained by examination upon the habeas corpus, and he be either discharged or remanded as the result may require.

V.

With a few additional observations upon the positions of the plaintiff and a summary of our own views we will conclude this brief.

The third position indicated (see Plf.'s Brief, pp. 1 and 5 *et seq.*) is that the United States courts can have no jurisdiction, because Congress has not defined murder generally, or affixed any punishment thereto. But Congress has, and has exercised, the right to declare, in general terms, the cases of which the United States courts shall take jurisdiction; and when it says all those "*criminal* cases" brought against a man for an act done in discharge of his duty as a Federal officer shall be transferred, this legislation shall be as effective for this purpose as though it enumerated the crimes of which such an officer might be accused.

Where United States laws do not apply, R. S., sec. 722, refers us to the common law and laws of the State for definitions of the crime charged, &c.

Directing the proceedings instituted in the State court to be carried to completion, by trial, &c., in the Federal tribunal, is equivalent to the adoption, *pro hac vice*, of the State legislation defining the offense and affixing the punishment. It is explicitly adopted by R. S., sec. 722. If the State attempted to declare obedience to the Constitution and laws of the United States a crime, the United States courts would declare such legislation unconstitutional and void, and the defendant justified in disregarding it. If the act were one required in the faithful discharge of duty to the national government, it could not be brought within any definition given of a crime by the State legislatures or courts.

It is contended that the attorney-general of Tennessee (Brief, p. 6, bottom) "has no right, as an officer of the State, to prosecute in the United States circuit court." Why not? Why has he not precisely the same right to appear in the United States circuit court that he has to appear here in the United States Supreme Court and file his brief in the present cause? What difficulty is there in holding that he may appear before any tribunal in which Tennessee has any cause to be prosecuted or any interests to be defended?

It is further argued (Brief, 8) that the defendant might, if his case were found to possess any Federal ingredient, bring it to this court, "*after going through the State courts.*"

The italics are found in the plaintiff's brief, and the cases of Martin *vs.* Hunter and Cohens *vs.* Virginia are cited in support of this position, without quoting from them. The copious extracts made by us from the opinions in those cases, and in that of Mayor *vs.* Cooper, show that they distinctly hold that there is no difference as to the power of removal, whether the cause be civil or criminal, or be removed before or after trial.

In Kulp *vs.* Ricketts (3 Grant's Cases, 425, cited sup.) these same cases are cited in the opinion of the court to sustain the position that the right to remove before and after trial is the same.

VI.

Our line of argument may be succinctly recapitulated:

1. *Some* power of removal must be admitted to exist; otherwise the extent of the judicial authority conferred

by the Constitution would be limited by the will of the plaintiff, or excluded if he chose to bring his suit in the State tribunal.

"The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and who would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow that, as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights." (Martin *vs.* Hunter, 1 Wheaton, 348–9.)

But if the right of removal exists at all, as the judicial power of this government extends to "*all* cases" arising under its Constitution and laws, criminal as well as civil causes may be removed, either before trial or after judgment. The character of the cause to be transferred, and the time and manner of transfer, rests in the discretion of Congress. Perceiving that this must be so if any right of removal were conceded, Mr. Calhoun denied the existence of any such right.

2. Congress may properly direct the removal of any cause, civil or criminal, in which the acts of the defendant are called in question which were done, or claimed to be done, in discharge of his duty as a Federal officer. It is his *claim* of privilege or immunity, by reason of

the protection and mandates of Federal law, that gives jurisdiction. This claim is the Federal ingredient; and cognizance must be taken to determine the validity of the claim, and may be retained to decide the whole case.

3. If the claim be found invalid, and the defendant adjudged guilty of infringing State laws, no difficulty is perceived in remitting the case to the State court for sentence, unless the provisions of R. S., sec. 722, necessarily require it to be passed in the Federal court.

4. The cause being removed, is to be prosecuted in the United States circuit court as if it could have been originally brought there, whether it could have been so brought or not. All the accessories necessary to a proper trial of the cause go along with it, even if resort must be had to the laws of the State to discover what these are. (R. S., sec. 722.)

5. The State, through its attorney, should prosecute the cause, if there is a desire to have it prosecuted, precisely as if it were plaintiff in a civil cause there. The State complains of a breach of its laws; the reply is that the alleged breach was really an obedience and execution of Federal law. This complaint and defense is heard in the Federal court, because the United States law is the supreme law. The anomaly arises out of the frame of our government, and exists solely because the people, having the right to give or withhold at will, chose to bestow the power of hearing such cases upon the Federal court. The State government is no nearer to the individual than is the national government in its sphere.

6. Congress having given the power to the United States circuit court to hear these criminal cases, recourse

may be had to the common law or statute law of the State to ascertain the nature and ingredients of the offense, &c. (R. S., sec. 722.)

7. But if Congress had failed to provide a method of procedure, this would not operate to prevent a removal of the cause, which is expressly authorized; and the defendant's claim should be passed upon, and be discharged or remanded, under R. S., sec. 753.

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